119-522

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 327. 82

L. C. WHITF[illegible]D, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF CLARK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what, of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Missouri.]

M. M. PRICE,
Clerk Circuit Court United States,
Eastern District of Missouri.
By A. P. SELBY, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly-certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 20th day of November, A. D. 1882.

[Seal of the United States Circuit Court, Missouri.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *D. C.*

[Endorsed:] No. 1934. United States circuit court, eastern district of Missouri. L. C. Whitford *vs.* County of Clark. Writ of error. To the circuit court of the U. S. east'r. dist. of Missouri. Returned and filed — day of —, 188–. ——, clerk.

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern District of Missouri.

Be it remembered that on the 28th day of November, A. D. 1881, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain petition, which said petition is in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

In the United States Circuit Court, Eastern District of Missouri.

L. C. WHITFORD, Plaintiff,
vs.
THE COUNTY OF CLARK, STATE OF MISSOURI, Defendant.

Plaintiff states that he is a citizen of the State of Illinois, and the defendant is a municipal corporation of the State of Missouri.

2 Plaintiff states farther that the defendant, under and by authority of an act entitled An act to incorporate the Missouri and Mississippi Railroad Company, approved Feb'y 20th, 1865, the county court of said Clark County, the defendant, being thereunto lawfully authorized, having subscribed to the capital stock of the said Missouri and Mississippi Railroad Company, did on the first day of June, A. D. 1871, execute and deliver its bonds or writing obligatory to the amount of one hundred and fifty thousand dollars to said railroad company in payment for said subscription; that said bonds were each for the sum of five hundred dollars, and were dated on said first day of June, A. D. 1871, and by each one of said bonds the defendant promised to pay said railroad company or bearer the sum of five hundred dollars in twenty years from said date, at the National Bank of Commerce, in the city of New York, and farther promised to pay interest on said bonds at the rate of eight per cent. per annum, payable semi-annually on the first

3 day of December and June of each year during said twenty years; that for each one of said payments of interest of said dates a coupon was attached to said bonds, by which said county promised to pay the bearer thereof the said interest due at each respective date on each respective bond; that said bonds were all the same in form and legal effect, and only varied in each one being numbered in order from number one to three hundred, inclusive, of both, and each coupon for the interest on said *said* bonds was in form and legal effect the same, and only varied in the date of maturity and according to the number of the bond to which it was attached.

Plaintiff states farther that said bonds were in the following form, and were all alike, except as to numbers:

UNITED STATES OF AMERICA,
County of Clark, State of Missouri:

Clark County Railroad Bond, No. 51. $500.

Know all men by these presents that the County of Clark, in the State of Missouri, acknowledges itself indebted and firmly

4 bound to the Missouri and Mississippi Railroad Company, or bearer, in the sum of five **500** hundred dollars, payable in lawful money of the United States of America at the National Bank of Commerce, in New York, twenty years after the date of this bond,

together with interest thereon from date at the rate of eight per cent. per annum, payable semi-annually on the first day of June and December on the presentation and surrender at said bank of the annexed coupons, as they severally become due and payable, this bond being issued in pursuance of an order of the county court of Clark county made under and by authority granted by the charter of said Missouri and Mississippi railroad.

In witness whereof the said County of Clark has executed this bond by the presiding justice of the county court of said county signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing hereto the seal of said county.

This done at the office of the clerk of said court this first day of June, A. D. 1871.

[SEAL.] S. W. MOREHOUSE,
Presiding Justice County Court, Clark County, Missouri.

5 Attest: MATT. WOODRUFF,
Clerk County Court, Clark County, Missouri.

Plaintiff states farther that each one of said coupons were in the following form except they were different as to date of maturity and number, which was according to the bond to which it was attached.

20. Railroad bond. 20.

WATERLOO, MO., *June 1st*, 1871.

The County of Clark, State of Missouri, will pay to the bearer on June 1st, 1891, at the National 40 Bank of Commerce, in the city of New York, twenty dollars, being semi-annual interest on bond No. 51 for $500.

MATT. WOODRUFF,
Clerk of Clark County Court.

And his said several causes of action, from one to six hundred, inclusive of both, are for interest due on said first-described bonds.

Plaintiff states farther that for the purposes aforesaid, and under authority aforesaid, the defendant executed a farther lot of fifty thousand dollars in bonds, which were in the same words and
6 figures and of the same legal effect as those hereinbefore described, except that they were for the sum of one thousand dollars each, and said coupons for interest were the same as aforesaid, except that they were each for the sum of forty dollars; that said last-named bonds were numbered from one to fifty, inclusive of both.

Plaintiff states farther that his several causes of action hereinafter set forth, which are numbered from 601 to 800, both inclusive, are from the said last-named bonds, and for interest due on the same as aforesaid.

1st count.

Plaintiff states that for his first cause of action the defendant owes

him the sum of twenty dollars for interest on one of the bonds heretofore described, numbered one, which was due December 1st, 1871, evidenced by the coupon detached from said bond, which is herewith filed, and of which plaintiff is the owner, by which it promised to pay said sum at said date at said bank, which it, too, refused to do, although demanded.

Plaintiff asks judgment for the amount of said coupon, interest, and costs.

H. A. & A. C. CLOVER,
For Plaintiff.

7–165 (Pages 7 to 165, incl., being further counts (2 to 800, inclusive, to petition, omitted in printing per stipulation of counsel. See page 326.)

166 On the 28th day of November, A. D. 1881, there was issued a summons on said petition in words and figues following, to wit:

167 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *set:*

In the Circuit Court of the United States in and for said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon the County of Clark, State of Missouri, citizen of the State of Missouri, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of L. C. Whitford, citizen of the State of Illinois, as set forth in the petition filed in said court on the 28th day of November, A. D. eighteen hundred and eighty-one.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 28th day of Nov'r, A. D. eighteen hundred and eighty-one.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *Deputy.*

168 On said summons was endorsed the marshal's return in words and figures following, to wit:

Marshal's Return.

I have executed this writ by delivering a copy thereof, together with a copy of the petition thereto attached, to S. F. Sackett, clerk of the county court of the within-named county of Clark, State of Mis-

souri, at Kahoka, in said district, on the 29th day of November, 1881, while said county court of said county of Clark was in session.

FELIX COSTE,
United States Marshal, Eastern District of Missouri,
By JAMES B. GEGGIE, *Deputy.*

And afterwards, to wit, on the 22nd day of March, A. D. 1882, the defendant filed its answer herein in words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Eastern District of Missouri.

LOT C. WHITFORD, Plaintiff,
against
THE COUNTY OF CLARK, Defendant.

169 And now comes defendant, and for answer to plaintiff's petition for defence to the causes of action, and each of them therein set forth, denies that it is indebted to said plaintiff in any sum for interest or any of the bonds mentioned in the plaintiff's petitition, and states that plaintiff never owned said bonds, or any of them mentioned in said petition, now or at any time, and states that the coupons set forth and sued on in plaintiff's petition are not, nor is *n*either of them, the act and deed of Clark county, and that said Clark county never delivered said coupons, or any of them, to plaintiff, or to any person, as its act and deed.

And for a further defence the said defendant says that no consideration was ever received by said Clark county from plaintiff's or any other person on account of said coupons, or any of them, and said plaintiff is not a holder of said coupons, or either of them, for value, nor has at any time any person been a holder of said coupons, or either of them, for value.

170 And for a further defense said defendant says that on the day of the date when said coupons, and each of them, passed out of the possession of said Clark county the same was the property of Clark county, and ever since has been, and avers that at the time when said coupons, and each of them, passed out of the possession of said Clark county the same immediately came into the possession of plaintiff, from the agent of Clark county, and at the time the same and each of said coupons came into possession of said plaintiff, and for a long time prior thereto, said coupons, and each of them, had been long overdue and dishonored.

Defendant denies that said defendant is indebted to said plaintiff on any account whatsoever, or that plaintiff is entitled to any judgment.

GLOVER & SHEPLEY,
Atty's for Deft.

And afterwards, to wit, on the 24th day of March, A. D. 1882, there was filed a reply in said cause in words and figures following, to wit:

171 *Reply.*

In the United States Circuit Court, Eastern District of Missouri. March Term, 1882.

LOT C. WHITFORD, Plaintiff,
vs.
THE COUNTY OF CLARK, Defendant.

The plaintiff, for reply to defendant's answer, says that he denies each and every allegation of defendant's answer as therein contained.

H. A. & A. C. CLOVER,
Attorneys for Plaintiff.
FISHER & ROWELL,
Att'ys for Plaintiff.

And afterwards, to wit, on the 3rd day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Jury Waived by Parties.

L. C. WHITFORD, Plaintiff, *vs* COUNTY OF CLARK, Defendant. } 1934.

Now come the parties, by attorneys, and in open court waive a jury herein.

172 *Trial Begun.*

And afterwards, to wit, on the 4th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

L. C. WHITFORD, Plaintiff, *vs.* CLARK COUNTY, Defendant. } 1934.

Now come the parties, by their attorneys, and file stipulation waiving a jury herein; and thereupon this cause coming on to be heard the same is submitted to the court for trial without a jury, and the evidence was partly heard, but not, being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

Said stipulation is in words and figures following, to wit:

Stipulation Waiving a Jury.

United States Circuit Court, Eastern District of Missouri.

L. C. WHITFORD *vs.* THE COUNTY OF CLARK.

The parties hereby agree to waive a jury in this case.

FISHER & ROWELL.
H. A. & A. C. CLOVER.

GLOVER & SHEPLEY,
Att'y- for Def't.

173 And afterwards, to wit, on the 6th day of October, A. D 1882, the following further proceedings were had and appear of record in said cause, to wit:

Trial Progressed.

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant. } 1934.

Now again come the parties, by their attorneys, and the hearing of this cause was resumed and the same was argued by counsel and submitted, but the court, not being fully advised as to what judgment to render in the premises, takes further time to consider thereof.

And afterwards, to wit, on the 9th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Judgment..

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant. } 1934.

Now again come the parties, by their attorneys, the plain-
174 tiff by Messrs. Fisher and Rowell, and the defendant by Messrs. Glover and Shepley, and this cause having been heretofore submitted to the court without the intervention of a jury upon the pleadings, proofs, and arguments of counsel, upon consideration whereof, and being now fully advised in the premises, the court finds the facts herein for the defendant, and orders that judgment be entered accordingly upon said finding of facts.

It is, therefore, considered by the court that the plaintiff take nothing by his writ herein; that the defendant, the County of Clark, go hence without day, and have and recover of the said plaintiff, L. C. Whitford, its costs in this behalf expended, and that a fee bill or execution issue therefor.

And afterwards, to wit, on the 12th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Motion for New Trial.

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant. } 1934.

175 Now comes the plaintiff, by attorney, and files motion to set aside judgment, and for a new trial.

And afterwards, to wit, on the 23rd day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Motion for New Trial Submitted.

L. C. WHITFORD, Plaintiff,
vs.
CLARK COUNTY, Defendant. } 1934.

Now comes the parties, by their attorneys, and the plaintiff's motion for a new trial herein is argued by counsel and submitted.

And afterwards, to wit, on the 26th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Order Overruling Motion for New Trial.

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant, } 1934.

Now comes the parties, by their attorneys, and the court,
176 having considered the plaintiff's motion for a new trial heretofore filed herein, orders that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 1st day of November, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Bill of Exceptions Allowed, Bond Approved, &c.

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant. } 1934.

Now comes plaintiff, by his attorney, and presents to the court his bill of exceptions herein, which is now signed and ordered to be filed and made part of the record herein. Said plaintiff also presents a writ of error to remove this course to the Supreme Court of the United States, and a citation citing and admonishing said defendant to be and appear at said Supreme Court on the second Monday in October next, and also presents his bond in the penal sum of five hundred dollars; and thereupon said writ of error is al-
177 lowed and said citation signed, and said bond is approved and filed, and ordered to be made part of the record herein.

Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

EASTERN DISTRICT OF MISSOURI, *ss:*

In the United States Circuit Court.

L. C. WHITFORD, Plaintiff, *vs.* THE COUNTY OF CLARK, Defendant.

Be it remembered that on the 3rd day of October, 1882, this cause coming on to be heard before his honor Samuel Treat, judge, a jury having been waived, the following proceedings were had:

The plaintiff offered in evidence the coupons sued upon in the case, which were admitted in evidence. They were in form as follows:

Railroad bond No. —.

WARTERLOO, Mo., *June 1st*, 1871.

178 The County of Clark, State of Missouri, will pay the bearer on June 1st, 1881, at the National Bank of Commerce, in the city of New York, twenty dollars, being semi-annual interest on bond No. — for $500.

MATT. WOODRUFF,
Clerk of Clark County Court.

One hundred of said coupons in form as aforesaid (except as to number and date of maturity) come due Dec. 1st, 1871, and were for the sum of twenty dollars each, and taken from bonds of Clark county, and described in the petition numbered respectively from one to one hundred, inclusive of both.

One hundred of said coupons were the same as last aforesaid, except that they were taken from bonds numbered respectively from 201 to 300, inclusive of both.

One hundred of said coupons of twenty dollars each, which were due June 1st, 1872.

Also, one hundred of said coupons for twenty dollars each, which were due Dec. 1st, 1872.

Also, two hundred of said coupons, which were due June 1st, 1873.

179 Also, fifty of said coupons, which were due Dec. 1st, 1871, for forty dollars each.

Also, fifty of said coupons, which were due June 1st, 1872, for forty dollars each.

Also, fifty of said coupons, which were due Dec. 1st, 1872, for forty dollars each.

Also, one hundred of said coupons, which were due June 1st, 1873, for forty dollars each.

The defendant admitted the execution and form of the bonds and coupons, but stated that it denied the legality of the original bond; that the coupons belonged to bonds which never had any validity.

The plaintiff introduced in evidence an act to incorporate the Missouri & Mississippi Railroad Company, approved Feb. 20, 1869, which was read as follows:

Act to Incorporate the Mo. & Miss. R. R. Co.

An act to incorporate the Missouri and Mississippi Railroad Company.

Be it enacted by the General Assembly of the State of Missouri as follows:

180 SECTION 1. A railroad company is hereby incorporated under the name and style of the Missouri and Mississippi Railroad Company, with a capital stock of four millions of dollars,

divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continued succession, may sue and be sued, plead and be impleaded, defend and be defended against in all courts of record in this State and elsewhere, and shall be able in law and equity to make and enter into contracts and become invested with the title to real and personal property, and to sell and convey the same for the purpose of constructing, using, and operating said railroad; may have and use a common seal and may make such by-laws, rules, and regulations as the directors of said company may ordain and establish from time to time for the purpose of carrying this charter into effect.

SEC. 2. That Abner L. Gilstrap, Thomas A. Eagle, and
181 Thomas Moody, of Macon county, and E. V. Wilson, S. M. Wist, and William F. Plummer, of Knox county, and Erastus Sacket, James M. Crane, and John H. Cox, of Clark county, shall constitute the first board of directors under this charter, and shall hold their offices until their successors are duly chosen and qualified. They shall meet at such time and place as may be designated by any three of them, giving reasonable notice thereof to the other directors; and a majority of said directors shall organize as a board and cause books to be opened for the taking of said capital stock at such times and places as the board may direct.

SEC. 3. The said company shall have the right to take grants of real estate and personal property at such price or prices as the said directors, or any of them, may agree upon in payment of stock subscribed from individuals or counties, and to take stock subscribed upon such conditions as may be determined in the by-laws.

SEC. 4. So soon as two thousand shares shall be subscribed the board shall call an election for directors, giving twenty days'
182 notice in such newspaper or papers as the board may direct, and in like manner, unless otherwise provided in the by-laws, shall call an election of the stockholders once in every two years thereafter, and the stockholders of said company, in person or by proxy, who may assemble at the time and place for holding any such election, may proceed to select nine directors, who shall compose the board until their successors are duly elected and qualified. All such elections shall be conducted as may be provided in the by-laws.

SEC. 5. The directors shall appoint the president, agents, clerks, engineers, superintendents, and other officers and servants for said company, and determine how and under what circumstances all contracts with the company shall be made and executed; shall keep a journal of their proceedings, and cause correct books and accounts to be kept; may fill all vacancies in any office of the company, and fix the salaries of the president and other officers, agents, and clerks, and take bonds for the faithful performance of their duties, and do such other acts and things as may be necessary and proper,
183 not in violation of the laws of the State of Missouri.

SEC. 6. The board of directors may order the payment of stock from time to time, giving notice thereof to the respective stock-

holders, as they may determine. If any stockholder fail to make his payment in pursuance of such order, the company may sue and recover the same, with interest at the rate of ten per cent., or may declare the stock forfeited if payment shall be refused for sixty days after the same should have been fully made, and forfeit also any payment or payments previously made thereon, and no such delinquent stockholders shall vote in said company.

SEC. 7. Said board of directors shall have full power and authority to survey, mark out, locate, and construct a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, in said State, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, Missouri, and for such purpose may obtain by grant, gift, or donation any quantity of land
184 for the purpose of a road-bed, not exceeding one hundred feet wide, depots, warehouses, machine shops, water stations, and turnouts, and may select such route as they may think best.

SEC. 8. Any such gift, grant, or donation for the purposes in the last preceding section may be made in the usual form by the owner, or, if such owner be a minor, by the guardian or contractor, approved by the probate court of the county in which the land lies.

SEC. 9. But if the owner of any such tract of land shall refuse to convey on such terms as the company may desire, or if he, she, or they shall be a minor, or unknown, of unsound mind, or a non-resident of the State, the company may file their petition in the proper county, before the circuit court or the judge thereof in vacation, stating therein the facts; and it shall be the duty of said court or the judge thereof to appoint three disinterested inhabitants of such county, who shall take into consideration the value of said tracts of land, and the advantages or injury of the road to the same, and report thereon, under oath, what damages,
185 if any, will accrue thereby to said tract or tracts of land, respectively, stating the amount of damages thereto, and return a plat of the lands thus condemned. Notice of such application shall be given to the owner in the same manner as summons are served, ten days prior thereto, or, if upon a guardian or contractor, twenty days, or, if a non-resident or unknown owner, by publication in the nearest newspaper to said lands, two insertions at least twenty days before said application.

SEC. 10. The said report, plat, and assessment shall be filed in the circuit court of the county in which any such lands may lie, and, if no objection be filed thereto within the first three days of the next term thereafter, the court shall enter judgment for the amount of damages in each case in favor of such owner and against said company, and make a decree vesting the title to the lands in question in said company. The amount of said damages shall be paid to the clerk of said court for the use of the owner; but if objection be made to such report or any part thereof the court shall hear the same, overrule the objections, or, if sustained, appoint three
186 other viewers. Objections may be filed by either party, but no second objection shall be filed, and the judgment shall be final.

SEC. 11. Said company may mortgage the road-bed, track, and rolling-stock, lands, and personal property for money to be expended in the construction of said road upon such terms as the board may determine, and may build their road along or across any county or State road, street, or alley by making or keeping in repair sufficient causeways at each crossing for the use of the public, and, in case of any tract of land being occupied, shall be divided by said road, the company shall keep up each (least) one causeway for the use of the owner.

SEC. 12. Said company shall commence the construction of said railroad within two years after they shall have obtained stock to the amount of one million of dollars, and shall complete the same within ten years thereafter. The company may extend their road from the said town of Macon, or from any other point on said road, in southwest direction to the Missouri river, or to such inter-
187 mediate point as they may think proper.

SEC. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.

SEC. 14. No stockholder shall be liable for more than the amount of his stock, nor shall this charter be liable to be repeated (repealed) or annulled within the time limited for the completion of said road, nor then if the said company shall have finished their road.

This act shall take effect and be in force from and after its passages. Approved February 20, 1865.

And the plaintiff here rested his case.

188 The defendant introduced evidence as follows:

Deposition of A. S. Tinsman.

The plaintiff objected to the reading of said deposition on the ground that said witness was at the time present in court.

It was admitted that said witness was present in court at the time of trial; that the deposition was taken in Clark county, Missouri, more than one hundred miles from the place of holding said court, where said witness resided.

The court overruled the objection and permitted the deposition to be read; to which action of the court the plaintiff then and there excepted. Said deposition was in words and figures as follows, to wit:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is A. S. Tinsman; age, 57 years; residence, Luray, Missouri; occupation, a practicing physician.

Ques. How long have you resided in Clark county?

189 Ans. Since 1847; about 34 years.

Ques. How long have you been a practicing physician in Clark county?

Ans. About twenty-five years.

Ques. Did you ever occupy any position of trust in and for Clark county; and, if so, since when?

Ans. Yes, sir; since 1871.

Ques. What position of trust was it?

Ans. Financial agent, I believe.

Ques. Financial agent of what?

Ans. Of Clark county, Missouri, and of the Mississippi and Missouri Railroad Company.

Ques. Please state, if you know, for what purpose and object you were appointed as financial agent aforesaid?

Ans. To take charge of two hundred thousand dollars of bonds and coupons attached, previously issued by the county of Clark to aid in the construction of the M. & M. railroad, running, through said county, and to pay them out upon the estimate of the engineer in accordance with the order of the county court of Clark county appointing me financial agent.

Ques. Did you receive any of such bonds and coupons as financial agent aforesaid, and, if so, how many?

190 Ans. Yes, sir; Two hundred thousand dollars of bonds, with the coupons attached.

Ques. Have you examined a summons issued from the United States circuit court of America for the eastern district of Missouri, on 28th day of November, 1881, wherein L. C. Whitford is plaintiff and the county of Clark and State of Missouri defendant, a suit founded upon about twenty thousand dollars of the Missouri & Mississippi Railroad Company coupons?

Ans. Yes, sir.

Ques. Did you ever have the coupons described on said summons in your possession as financial agent aforesaid?

Ans. Yes, sir.

Ques. When did they first come into your possession?

Ans. In the year 1871, attached to the bonds issued as aforesaid.

Ques. What did you do with them?

Ans. Deposited them with Bartholow, Lewis & Company, St. Louis.

Ques. When did you next see the coupons involved in this suit?

Ans. In March, 1872 or 1873, I think; I am not positive as to date.

Ques. Where were they then?

191 Ans. They were in St. Louis in the hands of the same parties, Bartholow, Lewis & Company aforesaid.

Ques. Did you or not withdraw from Bartholow, Lewis & Company said coupons at that time?

Ans. I did.

Ques. In what condition were they in at that time with reference to being attached or detached from the bonds?

Ans. They were detached.

Ques. Were the said coupons deposited by you with Bartholow, Lewis & Company as financial agent or not?

Ans. They were deposited with the bonds by me as financial agent.

Ques. After you withdrew them from Bartholow, Lewis & Company what did you next do with them?

Ans. Deposited them in the Exchange Bank of Pana, Illinois.

Ques. How long did they remain there?

Ans. I don't know how long they remained in the bank—probably a year.

Ques. Into whose possession did they then go, and by what authority and under what circumstances?

Ans. The Exchange Bank, in which the coupons involved in this suit were deposited, failed and went into bankruptcy;
192 they then passed into the hands of G. P. Lawrence, president of the bank.

Ques. How long did they remain in the hands of G. P. Lawrence?

Ans. From the failure of the bank up to May, 1878, or about that time.

Ques. State, if you know, what G. P. Lawrence did with said coupons.

Ans. He delivered them to me.

Ques. State, if you know, in what capacity he delivered them to you—whether as financial agent or otherwise.

Ans. He deposited them as financial agent of the county, and he simply returned them to me as such.

Ques. State whether or not those coupons are now in your possession, and, if not, when did they leave your possession and under what circumstances?

Ans. They are not now in my possession; they left my possession in June, 1881. At that time I simply delivered them to Mr. Rese H. Roseberry, he being one of the securities on my bond as financial agent of Clark county.

Ques. At the time you delivered the coupons involved in this suit were they the property of the county of Clark?

193 Ans. They were.

Ques. Were they ever at any time paid out by you to any person upon the estimate of the engineer of the Missouri & Mississippi Railroad Company?

Ans. No, sir.

Ques. Did you ever at any time receive from Rese H. Roseberry or any other person any consideration for the coupons involved in this suit.

A. No, sir.

Ques. Have you ever in any way or at any time sold the title to the coupons involved in this suit as financial agent of Clark county?

Ans. No, sir.

(Signed) A. S. TINSMAN.

Deposition of S. F. Sackett.

Defendant next offered in evidence the deposition of S. F. HACKETT, which was read as follows:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is Samuel F. Sackett; age, 33 years; reside in Kahoka, Missouri; occupation, clerk of the county court of Clark county.

194 Ques. How long have you held the position of county clerk?

Ans. Seven years.

Ques. By virtue of that office, have you the custody, care, and control of the records of the county court of Clark county, Missouri?

Ans. I have.

Ques. Have you in your possession or under your control any records of said court made prior hereto in reference to or appointing one A. S. Tinsman as financial agent of the county of Clark and the Missouri & Mississippi Railroad Company?

Ans. I have.

Ques. Have you that record here?

Ans. I have.

Ques. Will you produce, identify, and hand to the notary taking this your deposition said record for the purpose of making a copy thereof and embodying the same in your deposition?

Ans. Yes, sir.

Witness here produces county court record "G" and hands the same to the notary, and turns to page 460 and identifies the same as record made by the county court of Clark county, Missouri,

195 which is in words and figures as follows:

Clark County Court. May Term, May 3rd, 1876.

Now at this day comes the Missouri and Mississippi Railroad Company, by its attorney, James M. Aspoe, and moves the court as follows, to wit: That the said court, by and in behalf of the county of Clark, *to* subscribe for two thousand shares of the capital stock of the said Missouri & Mississippi Railroad Company, upon the terms and conditions set forth as per same filed this day, to wit:

It is hereby ordered by the county court of the county of Clark, in the State of Missouri, that the said court, for and in behalf of said county, do hereby subscribe for two thousand shares of the capital stock of the Missouri & Mississippi Railroad Company, upon the following terms and conditions, to wit:

First. That the subscription as aforesaid shall be paid in the bonds of Clark county, Missouri at par; that said bonds shall be of the denomination of five hundred and one thousand dollars each,

196 with coupons attached, said bonds running for the period of twenty years, and bearing interest at the rate of eight per cent. per annum, payable semi-annually at the National Bank of Commerce, in the city of New York.

2nd. That said bonds or the proceeds of the sale thereof, shall be used by the said railroad company in the construction of that portion of the their said railroad being within said Clark county, and for the necessary expenses of said company in said county, and for no other purpose whatsoever.

Third. So soon as the said company file with the county clerk of Clark county their acceptance, in writing, of this subscription in accordance with the terms thereof, this court shall forthwith issue said bonds properly executed, and immediately thereafter deliver the same to a financial agent to be chosen by said court. The said agent shall execute a good and sufficient bond, to be approved by said court and railroad company, said bond to be made payable to the State of Missouri, for the use of Clark county, Missouri, and the Missouri & Mississippi Railroad Company, and either of them,
197 and conditioned upon the faithful performance of duties as such agent. The financial agent shall have power to sell said bonds through the Saint Louis Bond and Stock Board, or through Bartholow, Lewis & Company, bankers, of St. Louis, Missouri, and shall pay over to said railroad company the said bonds or the proceeds of the sale thereof on the order of said company as fast as the work progresses on said company's railroad in said Clark county. Each payment to include all work and necessary expenses expended in said county by said company on their said railroad up to the date of said payment.

4th. The said railroad company shall locate and maintain their said railroad within one-third of a mile from the town of Fairmont and extending in a northeasterly direction to the town of St. Francisville, and shall locate depots both at Fairmont and St. Fracisville.

5th. The said railroad company shall within sixty days from and after the issuing of the bonds hereinbefore mentioned, and delivering the same as aforesaid, *shall* commence work on their said
198 railroad at Fairmont and St. Francisville, and shall continue the work continuously between said points, and push the entire work in said Clark county to completion without unnecessary delay.

6th. In case of the death or resignation of the financial agent his successor shall be appointed by the county court by and with the consent of said company.

7th. The acceptance of said Missouri & Mississippi Railroad Company of this subscription shall be held and construed as a release by said company of all rights, privileges, and franchises of which said company are or may be entitled to under and by virtue of an order made by this court at the August term, A. D. 1868, subscribing seven hundred and fifty shares to the capital stock of said company, and said company, by accepting this subscription, agree that said last-mentioned order may be rescinded and held for naught, and the same is hereby rescinded.

8th. Said railroad company shall deliver a certificate of paid-up stock for the full amount of their subscription when the bonds hereinbefore mentioned shall have been placed in the hands of the financial agent.

199 9th. It is further ordered that Roter S. Washburn be, and is hereby, appointed to vote the stock of Clark county in all elections held by the said Missouri & Mississippi Railroad Company, and that A. S. Tinsman be, and is hereby, appointed financial agent

in accordance with the terms of this order, whose bond is hereby fixed at the sum of two hundred thousand dollars.

10th. A certified copy of this order shall be delivered forthwith to the Missouri & Mississippi Railroad Company by county clerk of Clark county.

Motion sustained by the court, S. W. Morehouse disagreeing with the majority of the court.

Thereupon comes said company, by its said attorney, and files their acceptance of the aforesaid subscription upon the terms and conditions mentioned in said order as follows, to wit:

STATE OF MISSOURI, } ss:
County of Clark, }

To the honorable county court of the county of Clark and State of Missouri:

You are hereby notified that the order of said court, made this day, subscribing two thousand shares to the capital stock of the Missouri & Mississippi Railroad Company, is accepted by the said com-
200 pany on the terms and conditions presented in said order.

That the said Missouri & Mississippi Railroad Company do hereby agree, for and in consideration of the order aforesaid and subscription aforesaid, that the order of the said court, made at its August term, A. D. 1868, subscribing seven hundred and fifty shares to the capital stock of said company, may be rescinded and held for naught.

Done by the company this the 3rd day of May, A. D. 1871.

JAMES W. LEWIS,
Pres'd't M. & M. R. R. Co.
F. A. JONES,
Stock Agent M. & M. R. R. Co.

There being no further business before the court, thereupon court adjourned until the first Monday in June, 1871.

S. W. MOREHOUSE, *President.*

Ques. Have you in your possession, or under your control as said clerk, any other records relating to the appointment of said Tinsman as financial agent as aforesaid, or in relation thereto, or contract made with the county of Clark and the said Missouri &
201 Mississippi Railroad Company? If so, will you please hand all of said records pertaining to said contract to the notary now taking your deposition, for the purpose of embodying and copying said records in this your deposition?

Ans. I will.

Witness here produces county court record "G" and refers the notary to pages 478 & 479 & 541, 542 & 543, also 544, and identifies all of said record as being the record made by the county court of Clark county, Missouri; also hands to the notary the original bond filed by the said Tinsman, as financial agent of Clark county, for the purpose of making a copy thereof. The following is a true and

correct copy of page- 478 and 479, in record "G," of the records of the county court of Clark county, above referred to.

Clark County Court, May Adjourned Term. June 6th, 1871.

In the matter of subscription of Clark county, Missouri, for two thousand shares of the capital stock of the Missouri & Mississippi Railroad Company:

Now, at this day, comes A. S. Tinsman and presents to the
202 court his bond in the sum of two hundred thousand dollars, conditioned upon the faithful performance of his duties as the financial agent *agent* for the said railroad company, in receiving and disbursing the bonds or the proceeds of the sale thereof to be issued by the said Clark county to the said Missouri and Mississippi Railroad Company. Said bond is examined by the court and ordered to be held under advisement, and continued until the 2nd day of the next term.

Thereupon comes the Missouri & Mississippi Railroad Company, by its attorney, and shows that A. S. Tinsman, who was appointed financial agent to receive and pay over the bonds or proceeds of sale of same heretofore subscribed by this court to said railroad company, and that said company has by its authorized agent approved said bond, and asks that the court approve the said bond of said Tinsman.

M. & M. RAILROAD COMPANY,
By JAMES HAGERMAN, *Attorney*,

Thereupon it is ordered, by the court, that said motion be continued for further consideration until the second day of the July term, 1871. To which order of continuance the said Mis-
203 souri and Mississippi Railroad Company, by its said attorney, James Hagerman, then and there objected.

The following is a true and correct copy of the records of the Clark county court above referred to, as found in record "G," on page- 541, 542, 543, and 544, pertaining to the appointment and bond of said A. S. Tinsman, as financial agent of Clark county aforesaid, and a true and correct copy of the original bond filed by the said A. S. Tinsman in the county court of Clark county.

Clark County Court, May Adjourned Term. July 6th, 1871.

Ordered by the court: That the bond of A. S. Tinsman, financial agent of Clark county and The Missouri and Mississippi Railroad Company, be, and is hereby, approved by the court and ordered to be recorded, to wit:

We, A. S. Tinsman, as principal, and Rees H. Roseberry, James T. Wolf, Jesse McDaniel, Alfred Miller, A. L. E. Haywood, Henry C. Campbell, Nathan Smith, Charley L. Frost, Thomas Perkins, George Remley, William Bishop, J. M. Asher, B. Griffith, G.
204 M. Ochiltree, James B. Moore, S. C. Earley, James C. Earley, G. Jordan, Elkanah Little, Thomas M. Glenn, A. Barnett, Bryant Bartlett, C. A. Lewis, Lachainah Bectol, Alexander McCoy,

Rob't McKee, Isaac R. Campbell, B. P. Hannan, John Newman, Levi Culver, W. R. Wallace, as securities, owe and stand indebted to the State of Missouri in the sum of two hundred thousand dollars, for the true payment of which we bind ourselves, our heirs, executors, and assigns.

The condition of the above bond is such that whereas the aforesaid A. S. Tinsman was, on the 3rd day of May, A. D. 1871, duly appointed by the county court of Clark county as financial agent, to receive and pay out two hundred thousand dollars in the bonds of Clark county, to be issued in accordance with said order, as before mentioned, the same being full payment for two thousand shares subscribed to the capital stock of the Missouri & Mississippi Railroad Company:

Now, if the said A. S. Tinsman, after receiving said bonds, shall pay out the same or the proceeds of the sale thereof in accordance with the terms and specifications of said order then this bond
205 shall be void; otherwise shall remain in full force and virtue in law, and either the said Clark County or the said Missouri & Mississippi Railroad Company, or both, shall have and recover on said bond for any loss or damages they may sustain by reason of any neglect of duty or failure of the said A. S. Tinsman to fully comply with the terms and specifications of the order by which he was appointed as said financial agent.

In testimony whereof we hereunto set our hands and seals, this 31st day of May, A. D. 1871.

A. S. TINSMAN. [SEAL.]
JESSE McDANIEL. [SEAL.]
THOMAS M. GLENN. [SEAL.]
ELKANA LITTLE. [SEAL.]
ALFRED MILLER. [SEAL.]
GEORGE REMLEY. [SEAL.]
REES H. ROSEBERRY. [SEAL.]
A. BARNETT. [SEAL.]
JAMES B. MOORE. [SEAL.]
CHARLES L. FROST. [SEAL.]
ROBERT McKEE. [SEAL.]
HENRY C. CAMPBELL. [SEAL.]
JOHN NEWMAN. [SEAL.]
G. JORDAN. [SEAL.]
JAMES T. WOLF. [SEAL.]
S. C. EARLEY. [SEAL.]
206 THOMAS PERKINS. [SEAL.]
NATHAN SMITH. [SEAL.]
A. L. E. HAYWOOD. [SEAL.]
LEVI CULVER. [SEAL.]
G. M. OCHILTREE. [SEAL.]
BRYANT BARTLETT. [SEAL.]
B. P. HANNAN. [SEAL.]
W. R. WALLACE. [SEAL.]
WILLIAM BISHOP. [SEAL.]
J. M. ASHER. [SEAL.]

B. GRIFFITH. [SEAL.]
ALEXANDER McCOY. [SEAL.]
JAMES E. EARLEY. [SEAL.]
HENRY J. KING. [SEAL.]
B. P. HACKNEY. [SEAL.]
W. F. MERY TREUE. [SEAL.]
JACOB TINSMAN. [SEAL.]
C. WOLF. [SEAL.]
F. A. JONES. [SEAL.]

The within bond is approved June 6th, 1871.

MISSOURI & MISSISSIPPI
RAILROAD COMPANY,
By JAMES HAGERMAN,
Their Attorney.

Filed June 6th, 1871.

MATT WOODRUFF, *Clerk.*

Refiled June 20th, 1871.

MATT WOODRUFF, *Clerk.*

207 The within bond is hereby approved by the court this 21st day of June, A. D. 1871.

P. H. ROSEBERRY,
Justice of the County Court of Clark County.
PETER S. WASHBURN,
Justice Clark County Court.

The above and foregoing bond is examined and approved by the court and ordered to be recorded.

Receipt of A. S. Tinsman, financial agent for bonds issued by the county of Clark to the Missouri and Mississippi Railroad Company, to wit:

Received of the county court of Clark County, Missouri, three hundred bonds of the denomination of five hundred dollars each, and numbered from one to three hundred, inclusive; also fifty bonds of the denomination of one thousand dollars each, and numbered from one to fifty, inclusive; all of said bonds issued by said Clark county in payment of stock subscribed by the county of Clark to the capital stock of the Missouri and Mississippi Railroad Company by order of the county court of Clark county made at its May
208 term, A. D. 1871. The said bonds are hereby received upon the conditions and terms of said order, and as financial agent appointed by said court by said order.

A. S. TINSMAN,
Financial Agent for Clark County, Mo., & M. & M. Railroad Company.

Filed June 23rd, 1871.

MATT WOODRUFF, *Clerk.*

The above and foregoing receipt is examined by the court, approved and ordered to be recorded.,

Whereupon court adjourned until to-morrow morning at 9 o'clock.

S. W. MOOREHOUSE, *President.*

(Signed) S. F. SACKET.

Subscribed and sworn to before me on the day, at the place, and within the hours last aforesaid.

[SEAL.] T. L. MONTGOMERY,
Notary Public.

My notarial commission expires September 15th, 1884.

209 The defendant next offered to read in evidence the deposition of N. T. Cherry.

The plaintiff objected to the reading of said deposition on the ground that said Cherry was then present in court. It was admitted that said Cherry was then present in court, and that his deposition was taken in Clark county, Missouri, more than one hundred miles from the place of holding said court where said witness resided.

The court overruled the objection; to which action of the court the plaintiff then and there excepted.

The deposition of said Cherry was then read, as follows:

Notice to Take Depositions.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Eastern District of Missouri.

L. C. WHITFORD
vs.
THE COUNTY OF CLARK, State of Missouri, Defendant. } Case No. 1934.

To the above-named plaintiff, L. C. Whitford:

You are hereby notified that the depositions of N. T. Cherry, A. S. Tinsman, B. F. Fleshman, H. C. Campbell, Robert McKee, Bryant Bartlett, William McDermott, S. F. Sackett, C. Matlock,
210 A. L. Stewart, B. M. Turner, C. Duncan, Matthew Cooey, William Cooey, Murdock Cooper, L. L. Haywood, Thomas Curts, Charles McCoy, Thomas Glenn, David White, L. D. McKee, W. T. Haywood, Garrett Jordan, H. J. King, Alexander McCay, Willis Soule, G. S. Stafford, C. W. Merryhew, H. M. Hiller, C. B. Matlock, and others, as witnesses, to be read in evidence in the above-entitled cause on the part of the defendant, will be taken at the office of T. L. Montgomery, notary public, in the town of Kahoka, in the county of Clark, in the State of Missouri, on the 2nd day of March, 1882, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be con-

tinued from day to day at the same place and between the same hours till completed.

LIPSCOMB & STARK,
Att'ys for Defendant.

Service of the above notice is hereby acknowledged and issue of *dedimus* and all exceptions as to time waived, this 13th day of February, 1882;

H. A. & A. C. CLOVER,
Atto's for Pl'ff.

211 *Deposition of N. T. Cherry.*

N. T. CHERRY, of lawful age, being produced, sworn, and examined, deposes and saith:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is Nathaniel T. Cherry; of lawful age; 21 and upwards; residence, Alexandria, Clark county, Mo.; occupation, an attorney-at-law.

Ques. How long have you resided in Clark county, Missouri?

Ans. About twenty-five years.

Ques. How long have you been engaged in the practice of law?

Ans. About ten years.

Ques. Where have you been located during that time?

Ans. At Alexandria, Clark county, Missouri.

Ques. Are you familiar with the subscription for bonds commonly known as the M. & M. bonds of Clark county?

Ans. I was here during the time the subscription was taken and have been here in the county ever since, and was familiar with what was commonly said or talked about concerning them; also know that the road was never built for which the bonds were subscribed.

212 Ques. State, if you know, from the time the subscription was taken until the present time by the county court to the said Missouri & Mississippi Railroad Company, whether or not there has been any meetings of the tax-payers of the county of Clark in regard to said subscription.

Ans. Yes; I do. I believe I attended one or more, perhaps.

Ques. In what years were any of these meetings held?

Ans. I don't remember whether it was in 1876–'77 or 1878; it may have been later or it may have been earlier; my impression is that the one I refer to was held — 1877.

[Ques.] State, if you know, whether or not the public or tax-payers of Clark county, Missouri, were not in a constant state of commotion in opposition from 1871 until the year 1881 in reference to the fraudulent subscription of the Missouri & Mississippi railroad bonds before referred to.

Ans. I could not say that the people and tax-payers were opposed to it; but I would say, judging from those that I came in contact with, that they were, and that was the general impression of the people of the city.

213 Ques. Do you know what the people of Clark county generally said in reference to the subscription to the said Missouri & Mississippi railroad bonds being fraudulently issued?

Ans. The general opinion was that they were.

Ques. Had you knowledge of this general opinion from May, 1871, to November, 1881?

Ans. I had knowledge of what the people said generally and what the feeling was.

Ques. Have you at any time prior hereto been engaged as an attorney or agent, in relation to the litigation, either for or against Clark county concerning the said Missouri & Mississippi railroad bonds?

Ans. I have not prior to October, 1880, that I remember of; I believe it was in October.

Ques. What relation or how concerned or by whom employed was you in October, 1880?

Ans. By Mr. Rowell, an attorney from St. Louis.

Ques. For whom and for what purpose did Mr. Rowell employ you?

Ans. As attorney for certain holders of M. & M. bonds.

Ques. For what length of time did you act in that capacity?

Ans. From that time to the present.

Ques. Are you familiar with the coupons involved in this suit since June, 1881?

214 Ans. I have seen them. I have never examined the numbers on the petition, but suppose they are the same ones.

Ques. State when and where you first saw them, and in whose possession.

Ans. They were in possession or controlled by Rees H. Roseberry. I think I saw them about the middle of September, 1881, at La Cygne, Kansas.

Ques. Did you at that time count them; if so, what was their face value?

Ans. I have forgotten the number, but they represented the face value twenty thousand dollars.

Ques. State whether or not at that time you obtained possession of the coupons referred to.

Ans. I did not.

Ques Did you at that time or any other time negotiate for the said coupons? If so, state when and where.

Ans. I made an offer on them and they were placed in the bank about the 20th of September, 1881, or later, to be transferred on the payment of the money to Roseberry.

Ques. Did you see the coupons after that at any time? If so, state when and where.

Ans. I have not seen them since that I remember of.

215 Ques. Did you at the time referred to make and consummate a contract with the said R. H. Roseberry for the sale and trans— of the coupons involved in this suit?

Ans. I did.

Ques. Did you at the time pay for said coupons?

Ans. I did not pay for them.

Ques. Did you see any one or have any knowledge of them being paid for at that time?

Ans. No, I did not; they were placed in the bank as the result of this contract referred to, and when the price agreed on was paid they were to be forwarded as directed.

Ques. As directed by whom?

Ans. I am not certain whether I gave him the direction or whether it was to come by letter.

Ques. If you gave him the direction to whom were they directed to be sent?

Ans. I think, if I gave the direction, they were to be sent to L. A. Cocquard, St. Louis.

Ques. If the coupons were left in the bank to await instructions and payment by letter, from whom were said instructions and letter expected?

Ans. It would come from either Powell or Coquard; I don't know which; Cocquard, I think.

216 Ques. State if you know how long you remained at La Cygne, Kansas, at the time you negotiated for those coupons.

Ans. At the time I bought them I think I was there two days.

Ques. Did you at the time purchase the said coupons for yourself or as the agent of another?

Ans. I bought them as agent.

Ques. Did you, at the time you consummated the purchase, go there, instructed by your principal, limited to any certain amount, or after you got them did you receive such instructions?

Ans. I believe I went there limited.

Ques. Did you, after arriving there, receive any other or further instructions in regard to said purchase?

Ans. Yes, I received further instructions.

Ques. State what said additional instructions were.

Ans. To divide.

Ques. What do you mean by divide?

Ans. Divide the difference between the price asked and the price offered.

Q. Did you obey the instructions and complete the purchase?

Ans. I did.

217 Ques. From whom did the money come to pay the purchase price?

Ans. I left, and was not there at the time the money came.

Ques. By whom was it expected that the money for the coupons would be sent?

Ans. It would be sent by Whitford or Cocquard, a certified check on the Valley National Bank.

Ques. How do you know it was?

Ans. That was the agfeement.

Ques. Agreement between whom?

Ans. Myself and Roseberry.

Ques. Had you been instructed to make that kind of an agreement?

Ans. I was.

Ques. By whom?

Ans. My principal.

Ques. Who was your principal?

Ans. My instructions were from L. A. Cocquard.

Ques. To whom were these coupons and when were they to be sent?

Ans. The coupons, it was my understanding, were to be sent to Cocquard. I don't know whether there was any change or not. If there was any change it was made by letter.

Ques. State, if you know, who, if any one, had any right or authority to make any change in yours and Roseberry's contract before the sending away of these coupons from bank referred to except yourself?

218

Ans. Roseberry knew of the selling of the coupons to L. C. Whitford.

Ques. How or by what means did Roseberry know that he was selling those coupons to L. C. Whitford?

Ans. By signing a written contract.

Ques. When and where did Roseberry sign a written contract?

Ans. At La Cygne the day before the sale was made.

Ques. Who presented to him that written contract to sign, if anyone?

A. I think it was first handed to Roseberry's attorney by me; his attorney wrote part of it and I wrote part of it.

Ques. Where and when was that contract drawn up, and by whose instructions?

Ans. Drawn up at the time of the sale by the instructions of Mr. Rowell, at La Cygne, Kansas. The instructions of Mr. Rowell were given me before I went to Kansas.

Ques. State, if you know, where that contract is now.

Ans. I do not. I gave it to Mr. Rowell when I returned.

Ques. Was the contract drawn in duplicate?

Ans. No; it was merely a bill of sale signed by Roseberry.

219 Ques. You state that you were first employed in the Clark county M. & M. bond litigation in October, 1880; by whom were you employed; for what purpose and what object were your services sought to be employed?

Ans. I was employed in the interest of the bondholders, as I said before, by Mr. Rowell.

Ques. By what bondholders were you employed, and who of them, and how many did you represent?

Ans. I don't remember that he told me. Rowell said he represented one hundred and fifty thousand of the bonds.

Ques. Who had charge and control of the M. & M. bonds, except the coupons, in this suit from October, 1880, until the compromise was consummated with the county in November, 1881?

Ans. At the consummation I believe Mr. Coquard had charge of them.

Ques. State from whom, if any one, you have received compensa-

tion for your services in this bond matter, also in regard to the purchase of coupons involved in this suit.

Ans. As to bond matter, paid by Mr. Coquard; as to coupons, the same.

Ques. What business, if any, and where located, if you know, is L. A. Coquard, of whom you speak?

220 Ans. He is a banker and broker in St. Louis, Missouri.

Ques. State, if you know, what business, if any, Mr. Rowell is in, and where located.

Ans. Attorney-at-law at St. Louis, Missouri.

Ques. State, if you know, what relation Mr. Rowell sustained to L. A. Coquard during the month of September, 1881.

Ans. I suppose he was representing Coquard with other bondholders in this compromise as an attorney.

Ques. State, if you know, what capacity, if any, L. A. Coquard acted in the compromise of M. & M. bonds made by the county court of Clark county in November, 1881.

Ans. I presume he was acting as agent for the bondholders.

Ques. State whether or not you were acting as the agent of L. A. Coquard during the spring, summer, and fall of the year 1881 in aiding and assisting the said Coquard, as his agent, in making a compromise of a series of bonds commonly known as the Clark county M. & M. bonds, and about two hundred thousand dollars in amount.

Ans. I was acting for Mr. Coquard in the compromise, and signed the contract as his attorney to compromise the bonds in No-

221 vember, 1881.

Ques. State whether or not you have at any time been employed by any person or persons in this M. & M. bond matter, except your services in the compromise made, and the coupons purchased.

Ans. I have.

Ques. State by whom and at what time and in what capacity.

Ans. As attorney in this present suit by Mr. Rowell about the time the suit was brought, before the compromise was effected, if sued on.

Ques. Where and when did you deliver the bill of sale or contract referred to you as made with Roseberry in reference to the coupons involved in this suit?

Ans. At Kahoka, Missouri, I handed it to Mr. Rowell the first time I saw him after I came back from effecting the purchase.

Ques. About what length of time was it after you had effected the purchase of the coupons?

Ans. I don't remember. It must have been two or three weeks; some time in October, 1881.

Ques. At the time you purchased the coupons who did you

222 notify, if any one, that you had effected the purchase?

Ans. I don't think I notified any one. I don't recollect of writing any letters at that time in regard to it. They were sent off, I suppose.

Ques. To whom?

Ans. As directed, to Coquard, I think, for inspection.

Ques. If, upon inspection, Coquard became satisfied, was he to send the money?

Ans. No; the money had already been sent; I suppose the money was to come through the Valley National Bank.

Ques. How do you know it was?

Ans. That was the contract.

Ques. To what contract do you refer?

Ans. The agreement between Roseberry and myself in regard to the payment of their coupons.

Ques. What means, if any, did you adopt for the settlement or payment to Roseberry for the coupons?

Ans. I telegraphed to Coquard that I had bought the coupons—send the money.

Ques. State, if you know, what the distance is from your place of residence to St. Louis, Missouri, by the nearest travelled route.

Ans. About one hundred and sixty-seven miles.

223 Ques. Are you acquainted with Dr. A. S. Tinsman?

Ans. I am.

Ques. Do you know where his place of business is?

Ans. Luray, Mo.

Ques. State, if you know, the distance from his place of residence to St. Louis, Mo., by the nearest travelled route?

Ans. About one hundred and ninety miles, I think.

(Signed) N. Y. CHERRY.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

[SEAL.] T. L. MONTGOMERY,
Notary Public.

My notarial commission expires September 15th, 1882.

The defendant next offered the deposition of Bryant Bartlett.

The plaintiff objected to the testimony of said Bartlett on the ground that it was irrelevant, immaterial, and incompetent. But the court overruled the objection, to which action of the court the defendant then and there excepted.

224 The deposition was then read, which was in the words and figures as follows:

Deposition of Bryant Bartlett.

BRYANT BARTLETT, of lawful age, being produced, sworn, and examined, deposeth and saith:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is Bryant Bartlett; age, 65 years; residence, Clark City, Missouri; occupation, a farmer and trader.

Ques. How long have you resided in Clark county, Missouri?

Ans. About twelve years.

Ques. Are you acquainted with the geography of Clark county?

Ans. I am, pretty well.

Ques. Are you acquainted with the surveyed line of what was known as the Missouri & Mississippi railroad, its beginning, course, and termination in Clark county, Missouri?

Ans. I am with one-half or two-thirds of the northeastern part of same.

Ques. Have you been acquainted with that portion of it ever since its survey?

Ans. I have.

Ques. State, from that time to the present time, what condi-
225 tion the road-bed of said railroad has been in with reference to being improved and graded for railroad purposes, and how much work, if any, has been done on the same?

Ans. Most of the length of the line of which I have knowledge has all the time remained in a state of nature, without any work. I suppose there has been work done on some three or four miles of the road. I am not very definite as to length, and that done soon after the survey in 1872 or 1873. There has been no work done on said road since its abandonment in 1872 or 1873. In my opin[ion], not over fifteen thousand dollars' worth of work has been done in all.

Ques. State, if you know, whether or not the entire work on said railroad has been abandoned through Clark county, and, if so, how long since.

Ans. It has been abandoned altogether since early in 1873, and, probably, the latter part of 1872.

Ques. Do you know about the time the county court of Clark county, Missouri, made a subscription of bonds to the Missouri & Mississippi Railroad Company of two hundred thousand dollars?

226 Ans. I do.

Ques. Do you know of any mass meetings prior and subsequent to that time being held by the tax-payers of Clark county for the purpose of adopting means to resist and prevent the subscription by the county court of the bonds aforesaid. If so, state when and where, and in what manner, they were represented.

Ans. It having been rumored that the court *were* about to subscribe stock at the term of court immediately preceding the term at which the stock was taken, from six to ten hundred, mostly leading tax-payers of the county, assembled at the court-house, where the court *were* sitting, their purpose being to prevent, by any means, said subscription. At that meeting, mainly outside the court-house, speeches were made in opposition to the subscription, and, I think, all there assembled denounced the supposed purpose of the court to subscribe as a high-handed fraud on the county, and united in sending a committee to the court to earnestly remonstrate against said subscription, and to extort a promise from the court that it should not then, or at any subsequent time, be
227 made without the consent expressed by vote of the county and upon the court's personal assurance that such subscription would not be made at that or any other time without the consent of the people given by vote. The parties went home satisfied,

believing it would not be done. Several informal meetings, and one pretty largely noticed, were had subsequent to the issuing of the bonds with known purpose to resist the collection of taxes for the payment of interest and to resist the bonds.

Ques. State whether or not these meetings and gatherings of the people were of sufficient public notoriety to advise every one of their nature and character in the county.

Ans. They were; nearly the entire mass of voters of the county were in arms against their issue, and these meetings were represented by leading tax-payers from every township in the county.

Ques. State whether or not you know of N. T. Cherry and R. H. Roseberry having knowledge of these meetings.

Ans. I know they had knowledge of these meetings; every
228 man in the county had knowledge of them; at least the knowledge was general throughout the county.

(Signed) BRYANT BARTLETT.

The defendants next offered in evidence the depositions of Garret Gorden, Charles McCoy, George S. Stafford, and Benjamin D. Turner, which were read as follows:

229 *Deposition of Garret Jordan.*

GARRET JORDAN, of lawful age, being produced, sworn, and examined, deposeth and saith:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is Garret Jordan; age, 70 years; place of residence, St. Francisville, Missouri; occupation, farmer.

Ques. How long have you resided in Clark county, Missouri?

Ans. Forty-three or four years.

Ques. Are you acquainted with any portion of Missouri & Mississippi railroad surveyed line, beginning at St. Francisville and running near Fairmont, Clark county, Missouri? If so, state what part.

Ans. I am acquainted from St. Francisville south on the line for about 15 miles.

Ques. Do you know whether or not any grading, filling, or making any road-bed or other railroad improvements on said line of railroad has been done? If so, state what amount and when done?

Ans. I have been out on the road as far as they have worked in this county, with the exceptions of the work done at Fair-
230 mont; I never have been on the work at Fairmont; the most of the grading has been done south of St. Francisville for about two miles; there is some work done south of Fox river in this county—the work extended about one mile and one-quarter, but left unfinished; I have reference to grading.

Ques. Was this work and grading done south of Fox river, near the public travelled route?

Ans. Yes, sir.

Ques. Describe the character of the country with reference to its

being level or uneven near St. Francisville, where the railroad company graded near two miles of the road.

Ans. The distance graded is entirely level almost and easily graded.

Ques. Was or not this latter grading done near the town of St. Francisville?

Ans. Commenced at the town of St. Francisville and run about two miles south.

Ques. State how long, if you know, since any work of any kind has been done on said railroad in Clark county, Missouri.

Ans. About 8 or nine years ago.

231 Ques. Has or not, if you know, the work on said railroad been abandoned since that time?

Ans. I have never heard or known of any work being done since that time.

Ques. State how far you reside from the city of St. Louis, Missouri, by the nearest and most usually travelled route.

Ans. The- call it two hundred miles by water and about two hundred and eighty miles by rail.

(Signed) G. JORDAN.

Deposition of Charles McCoy.

CHARLES McCOY, of lawful age, being produced, sworn, and examined, deposeth and saith:

Ques. State your name, age, place of residence, and occupation.

Ans. My name is Charles McCoy; age, 35 years; place of residence, Kahoka, Clark county, Missouri; occupation, constable and deputy sheriff of Clark county, Missouri.

Ques. How long have you resided in Clark county, Missouri?

232 Ans. About twenty-five years.

Ques. Are you or not familiar with the line of survey of what is commonly known as the Missouri & Mississippi railroad through Clark county, Missouri?

Ans. I am.

Ques. State, if you know, whether said road has ever been finished.

Ans. It has not.

Ques. State, if you know, what work in reference to building said road has been done on said line of survey.

Ans. About two miles of the grading from St. Francisville, running south and over very level country; the work done there is what is commonly called surface work, ranging from four inches to one and one-half feet in height. A small amount of work has been done about 6 or seven miles further out on the line—this a cut—and some work has been done near Fairmont—just what amount I could not say.

Ques. State whether or not you have ever had experience in grading or working in railroad works.

Ans. I have had some.

The road had never been built, and that they felt that such a great wrong had been done that they would not pay much.

Ques. Had you any other conversation with said Coquard; if so, when and where?

Ans. Yes, sir; I had several conversations subsequent to that time with him.

Ques. Were these conversations with reference to the M. & M. railroad bond litigation and the compromise of the bonds and coupons?

Ans. They were.

Ques. What were their conversations and what was said? State fully.

Ans. It would be difficult for me to recall all of the conversations had with Mr. Coquard. The last one I had with him was in March,
(latter part), 1881, at St. Louis, after the county had voted to
239 compromise the bonds and coupons. This conversation was in a dispute between Mr. Coquard and myself about the terms of the compromise. I told Mr. Coquard that he had agreed with the county court to deliver up all of the bonds and coupons, and that he could control them all, and that upon the faith and belief in this statement from him the people had voted for the compromise, and that the county court, in its order submitting the vote to the people, had expressly agreed and stated to the people that they would not compromise part of the debt and leave a part outstanding. I insisted Mr. Coquard should deliver up all the bonds and coupons before the county court should issue renewal bonds. He told me that there was about twenty-five thousand dollars in coupons of the years 1871, 1872, and 1873 that he did not control, and that the county should not fail to perfect the compromise on this account, because the county was not legally bound to pay these coupons; that they were not a debt of the county, because, he said, the bonds
from which the coupons were detached were not delivered
240 until 1874. He and I both talked about the Supreme Court of the United States having so decided in one of the cases of Johnson *vs.* Clark County. He further said that they would soon be barred by limitation. I think this conversation took place in the presence of Mr. Sackett, the county clerk, and part — all of the county court and Mr. Rowell.

Ques. Are you acquainted with Clinton Rowell, of the firm of Fisher & Rowell, of St. Louis, Mo.?

Ans. I am; he is an attorney-at-law.

Ques. Do you know whether or not he represented L. A. Coquard as att'y in a settlement of the M. & M. bonds with Clark county?

Ans. I knew that he was Mr. Coquard's attorney.

Ques. How do you know?

Ques. Mr. Coquard came to my house in Kahoka in company with Mr. Rowell in the summer of 1880, and he introduced me to Mr. Rowell as his attorney. He and Rowell both after that frequently spoke to me about Mr. Rowell being his attorney, and Coquard referred me to Rowell as his attorney.

Ques. Have you at any time had any conversation with

241 Mr. Rowell in reference to the coupons involved in this suit; if so, when and where, and what were said conversations?

Ans. Yes, sir. I had several conversations with Mr. Rowell about them, both at St. Louis and at Kahoka, during the year 1881, while the compromise was pending between the county and Coquard. Mr. Rowell always told me that the county was not bound to pay those coupons, and said that Coquard was not bound, under the terms of his agreement for compromise with the county, to deliver them up, as they were not a debt of the county; that they were never delivered; that the bonds were not delivered until after the maturity of the coupons. He told me at Kahoka, either in August or September, 1881, in a conversation in reference to those coupons, what I have stated above; he said that he did not care whether the county paid them or not, as that should not interfere with the compromise; said he had agreed to compromise, leaving these coupons out. In the same conversation he made use of this language: "These coupons have cost us three thousand dollars."

(Signed) BENJAMIN E. TURNER.

Deposition of R. H Roseberry.

242 The defendant next offered in evidence the deposition of R. H. Roseberry, which was read, as follows:

R. H. ROSEBERRY, of lawful age, being first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith:

Question 1. State your name and place of residence.

Ans. 1. My name is R. H. Roseberry; residence, Linn county, Kansas.

Ques. 2. How long have you resided in Linn county, Kansas?

Ans. 2. About four years.

Ques. 3. Where did you reside previous to that time?

Ans. 3. Kansas City, Missouri.

Ques. 4. How long did you reside in Kansas City, Mo.?

Ans. 4. About one year.

Ques. 5. Where did you reside previous to that time?

Ans. 5. St. Francisville, Clark county, Mo.

Ques. 6. How long had you resided in Clark county, Mo.?

Ans. 6. About thirty-two years.

Ques. 7. State if you ever owned or held any bonds or cou-
243 pons known as the M. & M. bonds or coupons issued by Clark county, Mo.

Ans. 7. I owned or held in my possession twenty thousand dollars in coupons of the M. & M. bonds.

Ques. 8. State of whom you purchased or received said coupons, the time received by you, and consideration paid for same.

Objected to by defendant because incompetent and irrelevant.

Ans. 8. I received them from Amanda Tinsman, my sister, about June, 1881, at St. Francisville, Clark county, Mo.

Ques. 9. State what you paid for said coupons, if anything, at the time you received them.

Objected to by defendant because incompetent and irrelevant.

Ans. 9. At the time I received them I did not pay anything.

Ques. 10. State how you obtained said coupons and the circumstances under which they were given you by your sister, Amanda Tinsman.

Objected by the defendant because incompetent, irrelevant, and immaterial.

Ans. 10. About May, 1873 or 1874, at the circuit court of
244 Chariton county, Missouri, Keyetsville, the county seat (I think). I was at that time a creditor of the company building or constructing the Missouri and Mississippi railway. A portion of the railway completed from Glasgow to Salisbury, Mo., was sold at that term of the court under a lien or judgment in favor of Mr. Lewis (I think); I am not certain. That sale of the road cut out a part of the creditors, myself among the number. I then demanded of Mr. F. A. Jones, attorney for the company, some security on the amount due me from the company. He said there was twenty thousand dollars in coupons that the company was willing that Tinsman and myself should have to secure us.

Ques. 11. Do you know who were the officers of the railway company at that time?

Ans. 11. I don't remember their names.

Ques. 12. Do you know who were members of the construction company? If so, name them.

Objected by defendant as incompetent, irrelevant, and immaterial.

Ans. 12. I think Mr. Vandewater was president, Mr. Blair secretary, and Mr. Lawerence or Melville or Morse was treasurer;
245 Fogget and Jones, the attorney-, before referred to. It was my understanding that they were all members of the construction company; this knowledge was obtained through my business connections with them.

Ques. 13. State if any effort was made by you to procure any other security for your debt, after the agreement with Jones referred to.

Objected to by the defendant as incompetent and irrelevant and immaterial.

Ans. 13. No, sir.

Ques. 14. State where said coupons, after this agreement with Jones, were kept, if you know.

Ans. 14. Can't say that I know certain.

Ques. 15. State who was present at the time this conversation took place with Jones at Keytesville.

Ans. 15. Don't think any one was present, as the matter was intended to be confidential.

Ques. 16. State, if you know, what parties or persons knew of this agreement with Jones.

Objected to by the defendant as incompetent, immaterial, and irrelevant.

Ans. 16. As far as the members of the company was concerned, I do not know whether they knew it or not. I am satisfied that Tinsman knew that one-half of these coupons were intended for
246 me as collateral for my debt, if they were of any value.

Ques. 17. State where those coupons were at the time [of] the conversation with Jones, and where they have been since, if you know.

Ans. 17. My understanding was, at that time, that they were in the bank at Pana, Ill., and up to 1877 or 1878; after that time, by an agreement between myself and Tinsman, his wife, my sister, was to be custodion of said coupons.

Ques. 18. State what agreement, if any, was made by yourself and Tinsman at the time the coupons were delivered to you, with regard to his interest in the same?

Objected to by defendant as incompetent, irrelevant, and immaterial.

Ans. 18. There was no agreement between myself and Tinsman; he, Tinsman, was in favor of surrendering them to the county; said he was disgusted with the whole thing, and I took them on my own responsibility.

Ques. 19. State by reason of what contract or understanding you received said coupons?

Objected to by defendant as incompetent, irrelevant, immaterial, and asking for the conclusion of the witness. Question was withdrawn by plaintiff's attorney.

247 Ques. 20. State why said coupons were delivered to you by your sister.

Objected to by defendant as incompetent, irrelevant, immaterial, and as asking for the conclusion of the witness.

Ans. 20. I took them on my own responsibility. I demanded them of her and she delivered them to me.

Ques. 21. State if you have said coupons in your possession.

Ans. 21. I have not.

Ques. 22. State what disposition you have made of said coupons.

Objected to by the defendant as incompetent, irrelevant, and immaterial.

Ans. 22. I have sold them, and understood at the time that Coquard, of St. Louis, to be the purchaser; but at the time I signed a written contract or bill of sale I did not read it, but afterwards ascertained that the name of Whitford was in said contract as purchaser.

Ques. 23. Why did you not read said contract?

Objected to by the defendant as immaterial and incompetent.

Ans. 23. I simply asked my attorney if it was all right, and he said it was, and I signed it.

248 Ques. 24. State, if you remember, what you told Cherry as to how you came into possession of said coupons.

Objected to by the defendant as incompetent, irrelevant, and immaterial, and assuming.

Question withdrawn.

Ques. 25. State with whom the transaction of sale of the coupons referred to was made.

Ans. 25. N. T. Cherry, of Alexandria, Clark county, Mo.

Ques. 26. State, if you remember, what you told Cherry as to how you came in possession of said coupons.

Objected — by the defendant as incompetent, irrelevant, and immaterial.

Ans. 26. When Mr. Cherry came to my house I supposed at first he represented Clark county, and I stated to him I held some claims against the M. & M. railroad, and that I held the coupons as collateral for said claims, and if I could get the amount of my claim, which, I think, was something over five thousand dollars, I would surrender — coupons. I told him I got the coupons by the consent of — railroad attorney, or might have said by the consent of the railroad company.

Ques. 27. State what the indebtedness or claim referred to was.

249 Objected [to] by the defendant as immaterial, irrelevant, and incompetent.

Ans. 27. Two notes for thirteen hundred and thirty-three dollars, each signed by Vandewater, president of the construction company, given for goods and supplies furnished the men on the work of said construction company, and the balance was for goods furnished and time-checks purchases, making, with interest on notes, about five thousand dollars.

Ques. 28. State if you have received contract price of sale of coupons as agreed upon with Cherry.

Objected to by defendant as immaterial, irrelevant, and incompetent.

Ans. 28. I have.

Ques. 29. State at the time of the conversation before referred to with Jones was Tinsman at Keytesville.

Objected to by defendant as immaterial.

Ans. 29. He was not there.

Cross-examination by Mr. J. W. Reed, attorney for defendant:

Ques. 1. State, if you know, how much work was done on the M. & M. railroad in Clark county, Mo.

250 Objected to by plaintiff as not subject *as* cross-examination.

Ans. 1. There was some work done, but I don't know how much.

Ques. 2. When did said company commence work in Clark county, Mo., on said railroad?

Objected to by plaintiff as irrelevant and immaterial.

Ans. 2. They commenced work, I think, within sixty days from the time the bonds *was* issued.

Ques. 3. State, if you know, when work was abandoned on said railroad.

Objected — by plaintiff as immaterial and irrelevant.

Ans. 3. I think in 1873 or 1874.

Ques. 4. State, if you know, whether said railroad was ever completed or built.

Objected to by plaintiff as immaterial.

Ans. 4. That portion running through Clark county was never completed, as far as I know.

Ques. 5. What relationship, if any, does Dr. A. S. Tinsman, of Clark county, Mo., sustain to you?

Ans. 5. He is my brother-in-law.

Ques. 6. *Was* you acquainted with him from 1870 to 1882?

Ans. 6. I was.

Ques. 7. State whether or not Dr. A. S. Tinsman held any position of trust in and for Clark county, Mo., or in which Clark
251 county was a party, from and between the years 1870 and 1882. If so, what position was it?

Objected to by plaintiff as immaterial and irrel*a*vant.

Ans. 7. Financial agent for Clark county and for the Missouri & Mississippi Railroad Company too, I presume.

Ques. 8. You state you received the coupons involved in this suit in June, 1881. Please state if you remember what Dr. A. S. Tinsman said in regard to same at that time, if anything.

Objected to by plaintiff as immaterial, irrelevant, and incompetent.

Ans. 8. He said he was disgusted with the whole matter, and for his part was willing they should be turned over to the county.

Ques. 9. State, if you know, when debt of Western Construction Company to you was incurred.

Ans. 9. I think the claim I held was incurred between 1872 and 1874.

Ques. 10. State when you first became aware of the fact that the coupons involved in this suit was detached from bonds.

Objected to by plaintiff as incompetent, irrelevant, and immaterial.

Ans. 10. I think I heard Dr. Tinsman say they was detached

at the time they was removed from Bartholow, Lewis & Co., of St. Louis, Mo.

252 Ques. 11. State whether or not any other coupons of said bonds were detached at that time, if you know, except the coupons involved in this suit.

Ans. 11. I don't know.

Ques. 12. Do you know, of your own knowledge, that the coupons involved in this suit ever were at any time deposited in the bank at Pana, Ills.?

Ans. 12. No; I do not.

Ques. 13. Do you know, of your own knowledge, that there ever was at any time any of the bonds known as the Clark County M. & M. railroad bonds or coupons on deposit in bank at Pana, Ills.

Ans. 13. No; I do not.

Ques. 14. At the time you refer to conversation with Jones at Keytesville, had you then the notes you refer to and the time-checks against said construction company?

Objected to by plaintiff as incompetent, irrelevant, and immaterial.

Ans. 14. My recollection is I have the notes and most of the time-checks?

Ques. 15. In conversation with Jones at Keytesville, on the occasion referred to by you, what bonds and what coupons, and of what particular kind, did he say was in the bank at Pana, Ills.?

253 Objected to by plaintiff as immaterial.

Ans. 15. Jones said in that conversation that the railroad company was willing that I and Dr. Tinsman should have twenty thousand dollars coupons; he did not describe or designate any particular coupons or the coupons involved in this suit particularly.

Ques. 16. State whether or not you are acquainted with N. Y. Cherry, of Clark county, Mo.?

Ans. 16. Yes; I am.

Ques. 17. State whether or not you have —, at any time, any conversation with N. Y. Cherry during the year 1881 in regard to the coupons involved in this suit; if so, state where and when and the substance of said conversation.

Objected to by plaintiff as immaterial, irrelavant, and incompetent, and not specifying particularly what conversation.

Ans. 17. Mr. Cherry claimed to represent Coquard, of St. Louis; wanted to purchase the coupons, and I seen a telegram to him of instructions from Coquard or Rowell in regard to purchase of said coupons; this was in Sept., 1881. Mr. Cherry, at time of purchase of said coupons or shortly prior thereto, said to me the cou-

254 pons were valueless and a total loss to them, but they were purchasing them for the purpose of effecting a compromise then pending with the said county of Clark. He said the compromise involved all the M. & M. railroad Clark county bonds, and the county refused to compromise unless they got in these coupons.

Ques. 18. State what price was paid you for coupons involved in this suit, and where said sale was made and with whom.

Objected to by plaintiff as immaterial, irrelavant, and not the best evidence.

Ans. I was paid twenty-five hundred dollars for the whole amount of coupons involved in this suit. The contract of sale was made with Cherry at La Cygne, Kansas.

Ques. 19. State whether or not you made the contract of sale with Cherry personally or did you have some one to make it on your behalf; if so, state who.

Ans. 19. I did not personally. Col. J. D. Snoddy, my attorney, of La Cygne, Kansas, made the contract of sale for me.

Ques. 20. State whether or not you now have in your possession notes of thirteen hundred and thirty-three dollars each against
255 the Western Construction Company, the same notes referred to by you in your examination-in-chief.

Objected to by plaintiff as incompetent, irrelavant, and immaterial.

Ans. No, sir; I have not got the notes.

Ques. 21. State what disposition you have made of said notes.

Objected to by plaintiff as incompetent, irrelavant, and immaterial.

Ans. 21. One of *of* the notes I delivered to the Commercial Bank of Keokuk, Iowa, for the purpose of collecting or to be put in judgment; they afterwards informed me that suit was brought and judgment rendered in my favor against said company in St. Louis, Mo.; do not remember the date or the court. The other note I gave Jones and Bruck, of Macon city, Mo., for collection, and still hold their receipt for the same.

Ques. 22. State whether or not you still hold orders and time-checks you referred to in your examination-in-chief against said Construction Company?

Objected to by plaintiff as irrelavant and immaterial.

Ans. 22. I do.

256 Ques. 23. State whether or not you resided in Clark county, Mo., continuously from the time in 1871 that work was commenced on the Missouri & Mississippi railroad until said work ceased or was abandoned.

Objected to by plaintiff as immaterial.

Ans. 23. Yes, sir.

Ques. 24. State whether or not you know where the office or offices of the said M. & M. railroad was located.

Ans. 24. I do not know.

Ques. 25. State when and where you first seen the coupons involved in this suit and in whose possession.

Objected to by plaintiff as immaterial.

Ans. 25. In St. Francisville, Clark county, Mo., in June, 1881, I think. Amanda Tinsman handled them first when I seen them, and Dr. Tinsman had them and I had them myself.

Ques. 26. State in whose house you first saw them as described in the above answer.

Ans. 26. At Dr. Tinsman's residence in St. Francisville, Mo.

Ques. 27. State when and where the conversation or arrangement referred to by you in your examination-in-chief, with Dr. Tinsman, that Mrs. Tinsman was to be the custodian of these coupons,
257 took place and who was present.

Ans. 27. There was no one present except Dr. Tinsman and myself that I remember of, and the conversation took place at St. Francisville, Clark county, Mo., before I removed from there, I think, in 1877.

Ques 28. State whether or not you are the same R. H. Roseberry whose name appears as security on a bond given by A. S. Tinsman, as principal, as financial agent of Clark county?

Objected to by plaintiff as immaterial, incompetent, and irrelavant.

Ans. 28. I presume so; I signed a bond of that kind.

Ques. 29. State when you first knew, of your own knowledge, that the coupons involved in this suit were detached from the bonds.

Objected to as immaterial and irrelavant.

Ans. 29. In June, 1881; they *was* in my possession from that time until time of sale in Sept. of same year.

Redirect examination by plaintiff:

Ques. 1. State whether or not, at the time of your conversation with Jones at Keytesville, you knew he was attorney for the
258 company and was making settlements of claims against said company.

Objected to by defendant as incompetent, irrelavant, and immaterial, and not proper redirect examination.

Ans. 1. I knew that Jones was acting as attorney at Keytesville at the time the conversation took place.

Ques. 2. State whether or not, at the time Jones said to you that the railroad company was willing for you and Tinsman to have twenty thousand dollars in coupons, what coupons were referred to in that conversation, if you know.

Objected to by defendant as immaterial.

Ans. 2. They were known to be Clark county coupons, but no number or description referred to.

Ques. 3. State whether or not you knew at that time that Tinsman held twenty thousand dollars of Clark county coupons detached from bonds, and your means of knowledge.

Objected to by defendant as incompetent, immaterial, and irrelavant.

Ans. 3. I don't know only what I heard. My means of knowledge from Tinsman and Jones that there was fifty thousand
259 dollars in bonds and some coupons in the bank in Pana, Ills.

Objected to by defendant as hearsay, and neither of the parties named are parties to this suit.

Ques. 4. State whether or not at the time Cherry was talking to you in regard to these coupons he did not say he was representing the bondholders in this compromise, and that Coquard, of St. Louis, as the agent of the bondholders, was making the compromise.

Objected to by defendant as immaterial and incompetent.

Ans. 4. My understanding was Mr. Cherry was representing Coquard, and that Mr. Coquard was making the compromise between the M. & M bondholders and Clark county.

Ques. 5. State whether or not you knew were the office or offices of the construction company was kept.

Ans. 5. At Salisbury, Mo.

Ques. 6. State whether or not you knew at any time that your sister, Amanda Tinsman, had custody of the coupons under the agreement with yourself and Tinsman prior to the time you saw them in June, 1881, and your means of knowledge.

260 Objected to by defendant as incompetent and immaterial.

Ans. 6. They were delivered to her under the agreement with myself and Tinsman about 1877, and that she had them in her possession in 1881.

Ques. 7. You say you don't think any one was present at the time of the conversation with Jones at Keyetsville, Mo.; that the agreement was intended to be confidential; state why.

Objected to by defendant as immaterial, and assuming and agreement where *more* has been proven.

Ans. 7. There was other creditors there that were trying to get some satisfaction for their claims. I know some of them did not; my knowledge is by hearsay.

Recross-examination by defendant:

Ques. 1. State whether or not you know of your own knowledge whether Jones, the railroad attorney referred to, had any general authority to make settlements or payments of claims against railroad or against construction companies.

Objected to by plaintiff as immaterial and irrelavant.

Ans. 1. Not of my own knowledge I do not.

261 Ques. 2. State whether or not you ever had any other kind of understanding or talk with the said Jones except the one you have stated at Kytseville.

Objected to as irrelavant and immaterial.

Ans. 2. I think I and Jones had another conversation in reference to the same matter, but there was no written order or contract given me by Jones, but he still assured me that I and Tinsman were to have coupons to secure us.

Ques. 3. You state in your redirect examination that the coupons involved in this suit were delivered to your sister, Mrs. Amanda Tinsman, in pursuance of an agreement or understanding previously had between yourself and Dr. Tinsman; state how you know they were delivered to her as stated by you, and when said delivery was made, and by whom and at what place, and who was present.

Objected to by plaintiff as immaterial.

Ans. 3. I saw them in her possession in June, 1881. My recollection is I saw them in her possession in 1877 or 1878. They was delivered to her by Dr. Tinsman at St. Francisville, Mo.; do
262 not know that I was present; it was simply family matter, and I had confidence in him doing as he said he would.

Ques. 4. State whether or not you had at any time or held in your possession between the years 1870 and 1875 any mortgage bond or bonds of any kind or description of the M. & M. Railroad Company on said road-bed, or any part of same, as security for any claim or claims that you had or held against said company.

Objected to by plaintiff as incompetent, irrelavant, immaterial, and not subject to cross-examination.

Ans. 4. I had a certificate of deposit on Safe Deposit Co. of St. Louis, Mo., handed me by Dr. Tinsman, of ten thousand dollars, purporting for the benefit of myself and Henshaw equally, to apply on one claim, and after- I drew from Safe Deposit Co. of St. Louis, Mo., my share of five thousand dollars in bonds, and was told at the time that they were valueless by J. W. Morse, and I still hold in my possession and own said bonds. I received the certificate between 1872 and 1874, and I obtained the bonds after the railroad project had been abandoned in 1875 or 1876. Certificate was made
263 payable to Morse, I think, and I could not draw them without his consent, and when I obtained his consent and did draw them they were valueless.

Ques. 5. State what kind of bonds you refer to in your last answer, and why they were transferred to you.

Ans. 5. They were the first mortgage bonds issued by the Missouri & Mississippi Railroad Company. If they were of any value to secure my claim, — but was told at the time they were of no value.

(Signed) R. H. ROSEBERRY.

The defendant here rested its case.

The plaintiff next offered in evidence the deposition of Grove P. Lawrence, which was read, as follows:

264 *Deposition of Grove P. Lawrence.*

GROVE P. LAWRENCE, of lawful age, a witness called on behalf of the plaintiff, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

Question 1. What is your name, place of residence, and occupation?

Answer. Grove P. Lawrence; residence, Pana, Christian county, Illinois; special land agent and attorney to the land belonging to my father.

Question 2. How long have you resided in Pana, Illinois?

Answer. Twenty-four years.

Question 3. State in what business you were engaged about the years 1871 and 1872.

Answer. I was in the banking business in Pana, Illinois.

Question 4. State whether or not you were connected in any way with the construction company doing business in Missouri; and if so, in what capacity?

Answer. I was a member of the Western Construction Company, and also treasurer of same company.

Question 5. State whether or not said company was incorporated; and if so, where.

265 Question objected to by defendant's counsel, because immaterial, irrelevant, and secondary evidence.

Answer. It was incorporated in Macon City, Macon county, Missouri, under the laws of the State of Missouri.

Question 6. State whether or not you were one of the organizers of said Western Construction Company.

Objected to by defendant's counsel because immaterial, irrelevant, and secondary evidence.

Answer. I was.

Question 7. Give, if you remember, the names of the members of said company at the time of its organization?

Question objected to by defendant's counsel because immaterial, irrelevant, and secondary evidence.

Answer. The members were John Foggitt, of Springfield, Illinois; A. C. Vandewater, of Pana, Illinois; Mr. — Leggett, of Providence, Rhode Island; John C. Noyes, of St. Louis, Missouri; John W. Morse, of St. Louis, Missouri; F. A. Jones, of Macon, Missouri, and Grove Lawrence, of Pana, Illinois.

Question 8. State, if you know, who were the first officers of said Western Construction Company.

266 Question objected to by defendant's counsel because irrelevant, immaterial, and secondary evidence.

Answer. A. C. Vandewater as president, John Foggit as superin-

tendent, J. W. Morse as auditor, and G. P. Lawrence, treasurer; I think Mr. Morse was secretary, but am not certain; I am pretty sure he was.

Question 9. State whether or not F. A. Jones held any position connected with said company as attorney or otherwise.

Answer. F. A. Jones was attorney for the Western Construction Company, but whether appointed at the time of the organization or afterwards I do not know.

Question 10. State, if you know, what time said company was organized, and for what purpose organized.

Question objected to by defendant's counsel because irrelevant, immaterial, and secondary evidence.

Answer. I think it was organized in September, 1872, and for the purpose of building the Missouri and Mississippi railroad.

Question 11. State whether or not said Western Construction Company had any business transaction with said Missouri & Mississippi Railroad Company by contract or otherwise.

Question objected to by defendant's counsel because irrele-
267 vant, immaterial, and secondary evidence.

Answer. The Western Construction Company made a contract with the Missouri & Mississippi Railroad Company, or, rather, with Mr. Foggit, and it was afterwards ratified by the said railroad company.

Question 12. State whether or not said contract was not made by Mr. Foggit, as general superintendent of said Western Construction Company, with said Missouri and Mississippi Railroad Company.

(Question objected to by defendant's counsel because leading and incompetent.)

Answer. No. I think it was made with Mr. Fogget for the purpose of organizing a construction company to build the railroad.

Question 13. State whether or not any other or supplemental contract was made other than the one referred to in the following answer.

(Question objected to by defendant's counsel as immaterial and irrelevant and secondary evidence.)

Answer. There was a contract made at Macon city—a ratification of the transfer of the contract with Mr. Fogget to the Western Construction Company.

Question 14. What transfer do you refer to?

268 (Question objected to by defendant's counsel because immaterial and incompetent.)

Answer. I was referring to the transfer of the contract with Mr. Fogget to the Western Construction Company.

Question 15. State, if you know, the circumstances under which that transfer was made.

(Question objected to by defenant's counsel because irrelevant and immaterial and incompetent.)

Answer. Mr. Foggit came to some of the construction company, or to some who afterwards formed the company—to myself as one—and stated that he has seen some of the parties connected with the M. & M. Railroad Company; that they wanted to get some construction company to take the contract and finish the road, and I think he wanted to meet two or three of us. Two or three of us went up to Springfield, Illinois, to meet parties connected with the old company. They stated to us what had been done on the road, what they had expended, &c. Mr. Fogget went over to Missouri after that to examine, and returned with the form of a contract in which he was the principal party contracting. At the first or second meeting we had Mr. Bartholow, of St. Louis, *was* there; that was previous
269 to any forming of the construction company. We afterwards formed the construction company upon the representations of Mr. Foggit's contract of what had been done and what was available on the line of the railroad. There was afterwards a meeting of the stockholders of the M. & M. railroad, or their agents, to ratify the contract of Mr. Foggit with the Western Construction Company, at Macon city, Missouri, at which meeting the contract was ratified.

(Answer objected to by defendant's counsel, because the answer is not responsive to the question and is incompetent, immaterial, and hearsay, and is secondary evidence.)

Question 16. State whether or not you were present at Macon city at the meeting referred to at which said ratification was made.

Answer. I was present.

Question 17. State, if you remember, the terms and conditions of the contract referred to with the Missouri & Mississippi Railroad Company.

Question objected to by defendant's counsel, because it is immaterial, irrelevant, and secondary evidence.

Answer. I don't know that I can state them entirely, but will state them generally. We were to have the work already
270 done, the right of way obtained, all the subscriptions that were made and that were to be made, and the bonds of the road, and I do not remember how many thousands of dollars worth of stock to each mile. The construction company was to construct the road, build side tracks, and stock it from Keokuk to Kansas City.

Question 18. State, if you remember, the nature and extent of the subscription referred to in your last answer.

(Question objected to by defendant's counsel as irrelevant, immaterial, and secondary evidence.)

Answer. The subscriptions already made, as far as I can recollect, were Clark county, two hundred thousand dollars; Knox county, one hundred thousand; Macon county, an unexpected balance of thirty or forty thousand. I forget whether there were any others or not.

Question 19. State whether or not you know where the original contract referred to is or whether it is in existence at this time.

Answer. I do not know where it is or whether it is in existence.

Question 20. State if you know in whose possession are the
271 records, books, and papers of the Western Construction Company.

Answer. They were sent to John W. Morse, the auditor; that was the last I knew of them.

Question 21. State, if you know, where John W. Morse is.

Answer. John W. Morse is dead.

Question 22. State whether or not you ever made any effort to find or get said papers and records.

Answer. I enquired for them once of parties who ought to have known—of John C. Noyes, a particular friend of Mr. Morse, who would know as much about his private affairs as any one. Mr. Noyes was a member of the construction company.

Question 23. State, if you know, in what form the two hundred thousand dollar subscription of Clark county was made.

(Question objected to by defendant's counsel, because it is secondary evidence.)

Answer. It was in bonds of Clark county.

(Answer objected to as not being responsive to the question.)

Question 24. State, if you know, in what condition the Clark county subscription above referred to was in at the time the contract was made with the Western Construction Company.

(Question objected to by defendant's counsel as irrelevant and immaterial.)

272 Answer. It was in bonds under the control of the financial agent of Clark county, in Bartholow, Lewis & Co.'s bank, at St. Louis, Mo., so represented to us by the railroad company.

(Answer objected to by defendant's counsel as hearsay.)

Question 25. State, if you remember, the conditions, if any, in the contract with the M. & M. Railway Company with regard to the Clark county bonds referred to.

(Objected to by defendant's counsel, because the question is immaterial and is secondary evidence.)

Answer. They were to be delivered to the construction company upon the estimate of the railroad engineer.

Question 26. State, if you know, whether or not the Western Construction Company got the Clark county bonds referred to.

(Question objected to as irrelevant by defendant's counsel.)

Answer. The construction — did get the bonds.

Question 27. State, if you know, what disposition the construction — made of said bonds.

Answer. They used a portion of them as collaterals to borrow

money East—fifty thousand dollars. Sold fifty thousand dol-
273 lars through the St. Louis stock board to Mr. Grant; used one hundred thousand of them as collateral with Waterman & Beaver, of Philadelphia, for the purchase of iron.

Question 28. State whether or not the bonds used as collateral were redeemed by the Western Construction Company.

(Question objected to by defendant's counsel as immaterial and incompetent.)

Answer. They were not.

Question 29. State whether, if you know, the circumstances under which the construction company, when and where they got possession of said bonds.

(Question objected to by defendant's counsel as being vague and uncertain, immaterial, and incompetent.)

Answer. It was along in March or the fore part of April, 1873. We called, with the financial agent of Clark county, on Bartholow, Lewis & Co.; they stated they had a lien on the Clark county bonds for somewhere from twenty-eight to thirty-six thousand dollars.

Question 30. What was said by Bartho-w, Lewis & Co. in reference to the lien referred to in answer to the question?

(Question objected to by defendant's counsel as immaterial, irrelevant, and incompetent.)

274 Answer. They said they had a lien on the Clark county bonds and refused to give them up.

Question 31. State what Bartholow, Lewis & Co. said as to how they acquired the lien?

(Question objected to by defendant's counsel as immaterial, irrelevant, and incompetent.)

Answer. They said it was for advances made to the railroad company.

Question 32. State how the construction company got the bonds from Bartholow, Lewis & Co.

(Question objected to by defendant's counsel as immaterial and incompetent, and as also assuming that the construction company got the Clark county bonds from Bartholow, Lewis & Co.)

Question 33. State if the construction company got the Clark county bonds from Bartholow, Lewis & Co.; and if so, how they got them.

Question objected to by defendant's counsel as immaterial and incompetent and leading.

Answer. Yes; we got them; gave the Western Construction Company individual notes with individual indorsements to Bartholow, Lewis & Co.

Question 34. For what purpose did the Western Construction Company give their note to Bartholow, Lewis & Co., and in what amount?

275 Question objected by defendant's counsel as immaterial and incompetent.

Answer. To get the bonds out from under their lien so that we could use them when we earned them. I cannot tell the exact amount—from twenty thousand to thirty-six thousand dollars.

Question 35. State, if you remember, who indorsed the notes given by Bartholow, Lewis & Co. by the Western Construction Company?

(Question objected to by defendant's counsel as immaterial, incompetent, and secondary.)

Answer. All of the members of the original constructien company named except Mr. Leggit.

Question 36. State if the notes so given in the payment of this lien were ever paid, either in whole or part?

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. They were paid in part—twelve thousand dollars at one time, and I think we paid besides that once; don't know how much; am not certain about that.

Question 37. State if any steps have ever been taken to recover the balance due on said note; and, if so, what?

276 (Question objected to by defendant's counsel as irrelevant, immaterial, incompetent, and as secondary.)

Answer. I was sued in the United States court at Springfield, Illinois, as indorser, and judgment was taken against me. I think the amount was somewhere about thirty thousand dollars.

(Answer objected to by defendant's counsel as secondary evidence.)

Question 38. State, if you know, what was done with the bonds obtained from Bartholow, Lewis & Co. at the time the notes were given?

(Question objected to by defendant's counsel as incompetent, irrelevant, and immaterial.)

Answer. They were transferred from Bartholow, Lewis & Co. to the Exchange Bank at Pana, Illinois, and put in the vaults of the Exchange Bank.

Question 39. State, if you know, why they were put in the Exchange Bank.

(Objected to by defendant's counsel as incompetent, irrelevant, and immaterial.)

Answer. In order to prevent any more difficulty in drawing the bonds when they were earned.

277 Question 40. State, if you know, who managed or controlled the Exchange Bank of Pana, Illinois, at that time.

Answer. I managed and controlled it.

Question 41. State whether or not you gave any memorandum or receipt for those bonds when placed in the Exchange Bank. If so, to whom?

Answer. I gave a memorandum book, with an entry of the bonds in it, to A. S. Tinsman.

Question 42. State whether or not the construction company ever received estimates from the railroad engineer of the amount of work done by the construction company in Clark county.

(Objected to as calling for secondary evidence and being immaterial.)

Answer. They did.

Question 43. State, if you know, the amount of such estimates.

Answer. I don't know the exact amount now; it was in the neighborhood of two hundred thousand dollars; it was something over $200,000.

Question 44. State, if you know, what time the Western Construction Company begun in Clark county.

Answer. I think it was early in 1883; am not certain.

278 Question 45. State whether or not, at the time the bonds referred to were left at the Exchange Bank, were there any coupons detached from the same.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. There were some coupons detached.

Question 46. State whether or not, while said bonds remained in said Exchange Bank, you detached any coupons from said bonds.

Answer. I detached some after the construction company had drawn them.

Question 47. State, if you recollect, the amount of all the detached coupons while in the Exchange Bank.

Answer. Something like twenty-five or twenty-six thousand dollars.

Question 48. State, if you know, what was done with the detached coupons referred to; state fully.

Answer. Some of them went with the bonds they belonged to; some of them I gave two or three years ago to A. S. Tinsman on return of memorandum book; I don't know the amount I gave Tinsman; did not count them.

279 Question 49. State whether or not you recollect whether the coupons you gave to Tinsman were the coupons that were detached from the bonds when said bonds were left in the Exchange Bank, or those you detached afterwards yourself.

Answer. They were a portion of each.

Question 50. State why you gave the coupons referred to to Tinsman?

(Question objected to by defendant's counsel as irrelevant, incompetent, and immaterial.)

Answer 51. I thought that any man who would come from Clark county ought to have them. He brought the book back, and I thought they were worthless and I gave them to him.

Question 52. State, if you recollect, what Mr. Tinsman said when he called for the coupons.

(Question objected to by defendant's counsel as irrelevant, immaterial, incompetent, and hearsay.)

Answer. He said that Clarke county was after him, and talked of suing him on his bond as financial agent, and I told him if he could raise anything on them to take them; I told him that he had done his duty, and to fight the county.

Question 53. State whether the Western Construction Com-
280 ever authorized you to deliver these coupons to Mr. Tinsman.

(Question objected to by defendant's counsel as immaterial and incompetent.)

Answer. There was no authorization of the company that I know of.

Question 54. State what was the financial condition of the Western Construction Company at the time you delivered those coupons to Mr. Tinsman.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. Busted!!

Question 55. State if, at the time you delivered those coupons to Mr. Tinsman, there were any unpaid creditors of the Western Construction Company.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. There were a great many.

Question 56. State whether, if you had considered those coupons to be valuable, you would have delivered them to Mr. Tinsman.

(Question objected to by defendant's counsel as being irrelevant, immaterial, and incompetent.)

281 A. [If] we had considered them as valuable they would have been used as assets of the Western Construction Company.

Question 57. State, if you know, how much work was done by the Western Construction Company in Clark county.

Answer. Only by estimate of the railroad engineer.

Question 58. State, if you know, whether F. A. Jones acted as attorney for the Western Construction Company up to the the time of its failure.

(Question objected to by defendant's counsel as immaterial.)

Answer. He did, I believe.

Question 59. State whether or not F. A. Jones, as attorney for said

company, acted as attorney for the company in a settlement of claims against said Construction Company.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. I presume he did in conjunction with the president and the committee who managed these things. I had not much to do with that part of the business.

Question 60. State whether or not you were present at Keytesville, Missouri, at the spring term of the circuit court, in 1874 or 1875, at the time of the sale of the railroad from Salisbury to Glasgow.

282 Answer. I was present when it was sold; do not recollect the time.

Question 61. State, if you know, whether F. A. Jones was present at that time as attorney representing the Western Construction Company.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. I think he was.

Question 62. State for what purpose the money realized from the sale of the bonds to Grant, and from those bonds pledged in Connecticut, was applied.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. A portion of the money was used in payment of the notes given to Bartholow, Lewis & Co., and the balance was expended on the road in Clark and Macon counties; twelve thousand dollars was paid to Bartholow, Lewis & Co.

Cross-examination by the defendant's counsel:

Question 1. State at what time the Western Construction Company was organized.

Answer. In September or October, 1872.

283 Question 2. Was it organized for the purpose of building the Missouri & Mississippi railroad and equipping same from Keokuk to Kansas City?

Answer. It was.

Question 3. Did it ever do any other business?

(Question objected to by pl'ff's counsel as irrelevant, incompetent, and immaterial.)

Answer. It did not.

Question 4. What were the cash assetts of the Western Construction Company at the time of its organization?

Answer. Sixty thousand dollars.

Question 5. Was that amount paid into your hands as treasurer of the company?

(Question objected to by pl'ff's counsel as irrelevant, immaterial, and incompetent.)

Answer. The stock was all paid up. It did not all pass through my hands. I received some of the money at St. Louis and paid it out there.

Question 6. What amount of money did you receive and pay out at St. Louis?

Answer. I could not tell now; have no means of refreshing my memory just now.

Question 7. State, to the best of your knowledge, about what amount of money you received and paid out.

284 (Question objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I should say somewhere between thirty thousand and dollars; it might be more; I do not think it was less than that.

Question 8. Was any of that amount of money secured by the Western Construction Company from the sale or disposal of the Clark county bonds?

(Question objected to by pl'ff's counsel as irrelevant, immaterial, and incompetent.)

Answer. Not that I am speaking of.

Question 9. Was it your duty as treasurer of the Western Construction Company to pay the debts of said company when audited and allowed by the company?

(Question objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.)

Answer. It was my duty to furnish them money to pay the debts, and to go round and pay them.

Question 10. Did the Western Construction Company keep a record of its business transactions?

Answer. They did.

Question 11. Did the Western Construction Company ever fail financially; and, if so, when?

284½ Answer. They failed financially in the year 1874.

Question 12. What officer's duty was it to keep the record of the business transactions and contracts of the Western Construction Company?

Answer. It was the auditor's duty.

Question 13. Who was the auditor?

Answer. John W. Morse, of St. Louis.

Question 14. When and where did he die?

Answer. He died in St. Louis; I don't know when.

Question 15. Did he leave a family or any relatives?

Answer. He died unmarried and left no relatives, to my knowledge. He had one brother, but I do not know whether he was living or not at the time of John W. Morse's death.

Question 16. When and where did you see this brother?

Answer. I saw him in about 1873, in the auditor's office of the Indianapolis & St. Louis railroad, at St. Louis.

Question 17. How do you know that John W. Morse died in St. Louis?

Answer. I was merely told so. Inquiring for him, I was told he died in St. Louis; that is all I know.

Question 18. Did you ever make any inquiries in St. Louis of the officers of the court having probate jurisdiction whether or not John W. Morse had an executor or administrator of his estate?

285 (Objected to by plaintiff's counsel as irrelevant, incompetent, and immaterial, and as calling for secondary evidence.)

Answer. I did not.

Question 19. Did you ever make any inquiries as to whether he died leaving relatives; and, if so, were they lived?

(Question objected to by plaintiff's counsel as irrelevant, incompetent, and immaterial.)

Answer. I did not.

Question 20. When was the contract ratified between Foggit and the railroad company at Macon City, referred to in your examination-in-chief?

Answer. The transfer to the Western Construction Company was made, I think, in November, 1872; it might have been in September or October of same year.

Question 21. Was A. S. Tinsman present at the time of the transfer referred to?

(Question objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I think he was.

Question 22. Are you certain he was?

(Question objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.)

286 Answer. I am pretty certain he was.

Question 23. When were the books, records, and papers of the Western Construction Company, or any part of them, sent to John W. Morse, and who sent them?

Answer. It was some time in 1874. After the failure of our negotiations in Europe the books, records, and papers were boxed and sent to John W. Morse, St. Louis, by A. C. Vanderwater, John W. Morse, and myself.

Question 24. Where had these books, records, and papers been kept prior to that time?

Answer. They were then kept in the railroad office, at Salisbury, Missouri.

Question 25. Where were these sent from to John W. Morse?

Answer. Salisbury, Missouri.

Question 26. When was it you inquired of John C. Noyes as to where the contracts, records, and papers of the Western Construction Company were?

Answer. I met him here, at the depot in Pana; heard he was coming and made the inquiry when the train was changing cars. It was three or four years ago, I should think.

Question 27. When were the notes of the Western Construction Company to Bartholow, Lewis & Co., to redeem the Clark
287 county bonds, executed and delivered?

Answer. I think it was in the fore part of the year 1873.

Question 28. Who took possession of the Clark county bonds when they were delivered by Bartholow, Lewis & Co. and to whom did they deliver them?

Answer. There were three or four of us there together; Mr. Tinsman was there, too. He took the bonds and took them to Morse's office, and, after checking them out, delivered them to Mr. Tinsman. They were put into Tinsman's satchel.

Question 29. Who checked the bonds out from Bartholow, Lewis & Co.?

(Question objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I don't know who did check them out.

Question 30. Who receipted to Bartholow, Lewis & Co. for the bonds, if any one?

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. Mr. Tinsman receipted for them.

Question 31. What official position did you hold in the Exchange Bank of Pana, Ill's?

Answer. I was owner; it was a private bank.

288 Question 32. Did you keep a record of the business transactions of the bank and of the special and general deposits?

Answer. I kept a record of all general deposits. I kept merely a memorandum record of special deposits.

Question 33. How were the memorandum records kept?

Answer. I generally gave a memorandum to parties. Sometimes it was given on a memorandum ticket, and sometimes the special deposits were merely placed in the vault in tin boxes or envelopes.

Question 34. When did A. S. Tinsman, financial agent of Clark county, deposit the Clark county Missouri & Mississippi railroad bonds and coupons in your bank?

(Objected to by pl'ff's counsel as assuming that Tinsman deposited the bonds there, and that he was financial agent of Clark county.)

Answer. On the same day we gave our notes to Bartholow, Lewis & Co.

Question 35. Were there ever any Clark county Missouri & Mississippi railroad bonds deposited in your bank at Pana, Ills.?

Answer. They were placed in the vault there.

Question 36. Who deposited them in the vault of the bank?

289 Answer. I did.

Question 37. Who, if any one, gave them to you to deposit or to place them in the vaults of the bank?

Answer. A. S. Tinsman.

Question 38. Did you or not give to him any certificate, memo-

randum, or book account containing the amount of bonds and coupons deposited by him?

(Question objected to by pl'ff's counsel as calling for secondary evidence.)

Answer. I gave him a memorandum in a book.

Question 39. In whose handwriting was the memorandum given?

Answer. In my own handwriting.

Question 40. When and where did you last see that book containing the memorandum?

Answer. I saw a book that I supposed was that book within a year and a half; the children had been using it and had torn it at my house. It had the name of A. S. Tinsman on it.

Question 41. Was the book that you gave to A. S. Tinsman the kind of book you usually gave to depositors?

290 Answer. I suppose it was; it was about the only kind of book we used in the bank for that purpose.

Question 42. Describe the kind of book it was.

Answer. It was common, little pass book, owned by and used by depositors. I presume, probably, with the name of the exchange bank printed on it. I presume it was leather covered or paper, with buff color.

Question 43. When and where did you get that book from A. S. Tinsman?

Answer. It was some three or four years ago; at my residence here in Pana.

Question 44. Was that the same book you referred to in your answer to questions 48 and 51 in chief?

Answer. It was the same memorandum book.

Question 45. Did you ever give to A. S. Tinsman more than one book containing any memoranda of his deposit of Clark county Missouri & Mississippi railroad bonds and coupons?

Answer. I never gave him but one memorandum.

Question 46. State to the best of your recollection what memorandum you entered in the book you gave to A. S. Tinsman of his deposit of Clark county Missouri & Mississippi Railroad bonds and coupons?

291 (Question objected to by pl'ff's counsel, as calling for secondary evidence, and as being immaterial and irrelevant.)

Answer. I don't recollect whether there was anything written in the book but a simple memorandum—$200,000 Clark county bonds; $20,000 to $26,000 detached coupons.

Question 47. Are you certain that the memorandum showed a deposit of $200,000 of Clark county Missouri & Mississippi railroad bonds and coupons?

Answer. I am pretty sure it did.

Question 48. Where is that memorandum book now?

Answer. I do not know.

Question 49. Where was it when you last saw it?

Answer. The book which I supposed was that one was lying on a

stand in my house. I merely picked it up; saw that name on the back and threw it down again. The leaf was torn in two which, I think, contained the memorandum, and a portion of it was gone.

Question 50. Have you made any search at any time for that memorandum book, or the torn leaf; if so, when and where?

Answer. I did look for it once, but failed to find it. It was a few weeks ago at my house in Pana.

292 Question 51. State if you recollect whether or not the memorandum book you gave A. S. Tinsman showed by your entries therein that the Clark county Missouri & Mississippi railroad bonds were deposited by him individually or as agent.

(Question objected to by pl'ff's counsel as calling for secondary evidence.)

Answer. I do not recollect how it was written.

Question 52. Who, if any one, drew the Clark county Missouri & Mississippi railroad bonds and coupons out of the Exchange Bank or out of your possession?

Answer. They went to the Western Construction Company on estimates.

Question 53. By whose order?

Answer. In accordance with the contract with the railroad company.

Question 54. Have you in your possession or under your control any drafts or orders on the Exchange Bank of Pana, Illinois, from A. S. Tinsman for the Clark county Missouri & Mississippi railroad bonds and coupons to be paid over to himself or any one else?

Answer. I have one order, I think, from A. S. Tinsman.

Question 55. Will you produce that order to be used in evidence in this case to be annexed to this deposition?

293 Answer. Since my answer to question 54 I have searched for the order from A. S. Tinsman among the papers where I supposed it was, but cannot find it.

Question 56. State if you recollect the contents of said order, who it was drawn on, who by, in whose favor, and for what amount.

(Objected to by counsel for plaintiff as calling for secondary evidence.)

Answer. It was drawn by me. I do not recollect whether it was drawn in favor of the Western Construction or the M. & M. Railroad Company; by A. S. Tinsman; and for somewhere between one hundred thousand and two hundred thousand dollars, I cannot state the exact amount; in Clark —— Missouri & Mississippi railroad bonds.

Question 57. To whom, if any person, did you deliver railroad bonds under said order?

Answer. I delivered the railroad bonds on the estimates of the railroad engineer. I do not know that I delivered any bonds on that order at that time. It was understood they were to be delivered on the railroad engineer's estimate.

(Defendant's counsel object to all that part of witness's answer beginning with "I was understood" and ending with
294 "estimate," because it is not responsive to the question, and gives the conclusion of the witness, besides being vague and indefinite.)

Question 58. Did you at any time deliver to any person any of the Clark county Missouri & Mississippi railroad bonds on the order of A. S. Tinsman? If so, when, where, and what amount.

Answer. I don't recollect of delivering any on his order.

Question 59. Did you at any time deliver to any person any coupons of the Clark county Missouri & Mississippi railroad bonds on the order of A. S. Tinsman? If so, to whom, at what time and place.

Answer. No; I did not.

Question 60. State, if you know, where the order that Tinsman drew on you for the Clark county Missouri & Mississippi railroad bonds and coupons is?

Answer. I do not know.

Question 61. In whose possession did you last see the order?

Answer. It was in my possession.

Question 62. Where was it you last saw it?

295 Answer. I think it was something over two months ago; might have been four months.

Question 63. What did you do with the order when you last saw it?

Answer. I put it back in the desk. I do not recollect of doing anything else with it.

Question 64. Where is that desk?

Answer. In the dining-room of my house in Pana, Illinois.

Question 65. Who has access to that desk beside yourself?

Answer. Any of the family.

Question 66. Have you looked in that desk for that order since you last saw it?

Answer. I looked there to-day.

Question 67. Did you examine all the papers in the desk in your search for said order?

Answer. I think I went through everything.

Question 68. Did you ask the members of the family for the order, or if they had seen it?

Answer. I asked them if they had been at my desk.

Question 69. Do you keep other business papers in said desk?

Answer. I do; letters and correspondence, memoranda and judgments.

Question 70. Did you miss any other of your papers, letters, or correspondence in that desk?

(Question objected to by pl'ff's counsel as being irrelevant, immaterial, and incompetent, and it has not been shown that the
296 archives searched for other papers, and does not ask at what time he missed other papers.)

Answer. I was not looking for anything else.

Question 71. You examined all the papers in searching for this order to-day, did you not?

Answer. I did. I examined all the papers which I thought could be the order twice.

Question 72. During that search you did not miss any other papers, did you?

Answer. Not that I am aware of.

Question 73. At the time you last saw this order, three or four months ago, did you read it?

Answer. I glanced over it.

Question 74. Did you ever show the order to any other person, or did any other person ever see it to your knowledge?

Answer. I do not recollect of showing it to any person. I may have done so.

Question 75. At the time you saw and read the order last, at whose request, if any one's, you were looking at the order?

Answer. I think I was looking over a memorandum and papers for L. A. Coquard, of St. Louis.

Questien 76. Did he ever see that order?

(Question objected to by pl'ff's counsel as irrelevant, incompetent, and immaterial.)

Answer. I don't think he did.

297 Question 77. Did you ever, after reading the order the last time, make any business trips, connected with this litigation, to St. Louis?

(Objected to by pl'ff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I was in St Louis once in connection with this and other business of my own.

Question 78. At whose instance, if at any person's, and when did you go to St. Louis on this business?

(Objected to by pl'ff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I went there at the request *at the request* of Mr. Coquard. I think it was some two or three months ago.

Question 79. Did you see him?

Answer. I saw him.

Question 80. Did you talk with him about this case?

(Objected to by pl'ff's counsel as irrelevant, immaterial, and incompetent.)

Answer. I did.

Question 81. Did you while you were in St. Louis at that time, talk with the attorneys of the plaintiff in this suit about this litigation?

Answer. I saw the attorneys I suppose were in this case and talked with them about this case.

Question 82. Have you ever made any other trips to St. Louis since that time?

Answer. I have been in St. Louis three or four times since.

Question 83. Did you go there at the instance of L. A. Coquard or the pl'ff in this suit, or his attorneys?

298 Answer. No, sir; I did not see Mr. Coquard or any of the attorneys for the plaintiff since that first time.

Question 84. Would you know, if you should see it, the memorandum book that you gave A. S. Tinsman, the financial agent of Clark county, containing the certificates of deposit in Exchange Bank, Pana, Illinois, of the Clark county Missouri & Mississippi railroad bonds and coupons?

(Question objected to by plaintiff's attorneys as assuming that the book mentioned contained certificates of deposit.)

Answer. I would know the book I gave Mr. Tinsman, I think, if I could see it.

Question 85. Would you know the memorandum book that you gave A. S. Tinsman, financial agent of Clark county, containing a memorandum of his deposit of Missouri & Mississippi railroad bonds and coupons of Clark county in Exchange Bank of Pana?

(Question objected to by pl'ff's counsel as assuming that Tinsman was the financial agent of Clark county, or that he ever deposited any bonds or coupons in the Exchange Bank.)

Answer. I would know the memorandum book I gave Mr. Tinsman.

Question 86. Would you know the memorandum book that you gave A. S. Tinsman containing a memorandum of the deposit

299 of Missouri & Mississippi railroad bonds and coupons in Exchange Bank of Pana?

(Question objected to by defendant's counsel as assuming that there was a deposit.)

Answer. I would know the book.

Question 87. Look at the book now handed you and filed with this deposition and made a part thereof, marked Exhibit "A," and state whether or not it is the same memorandum book that you gave A. S. Tinsman at the time he deposited with the Exchange Bank of Pana, Illinois, Clark county Missouri & Mississippi railroad bonds and coupons?

Answer. I think it is the same book.

Question 88. Have you examined the values in the memorandum book, marked Exhibit "A," containing the entries of deposit of A. S. Tinsman of Clark county Missouri & Mississippi railroad bonds and coupons? If so, in whose handwriting are the entries made?

(Question objected to by pl'ff's counsel as assuming that the entries of memorandum are the entries of deposit of Clark county M. & M. railroad bonds and coupons.)

Answer. I have examined the entries in the memorandum book marked Exhibit "A;" they are in my handwriting.

Question 89. Look at the book now handed you, marked
300 Exhibit "A," on the first and second pages of said book, and state in whose handwriting the entries are made.

Answer. I have examined the same; they are in my handwriting.

Question 90. State, if you know, what bonds and coupons such memorandum shows were then deposited by A. S. Tinsman.

(Question objected to by plaintiff's counsel as assuming that A. S. Tinsman deposited any bonds in the Exchange Bank.)

Answer. It is a record of the M. & M. railroad bonds and coupons.

Question 91. Look at the book marked Exhibit "A," and, after refreshing your memory, state how many Clark county M. & M. railroad bonds and coupons A. S. Tinsman deposited or left in charge with the Exchange Bank of Pana, Illinois.

Answer. One hundred and ninety thousand dollars in bonds and twenty-four thousand dollars in coupons.

Question 92. Look at the book now handed you marked Exhibit "A," and state whether or not the memorandum made therein by you of A. S. Tinsman's deposit of Clark county railroad bonds and coupons is correct or not.

(Question objected to by defendant's counsel as assuming a deposit of said bonds and coupons was made by A. S. Tinsman.)

Answer. I think it is.

301 Question 93. Did A. S. Tinsman ever deposit any other bonds with the Exchange Bank of Pana, Illinois, other than the ones mentioned in memorandum book marked Exhibit "A?"

(Question objected to by plaintiff's counsel as assuming a deposit of bonds and coupons by A. S. Tinsman.)

Answer. None other.

Question 94. Were the bonds and coupons deposited in the Exchange Bank of Pana, Illinois, by A. S. Tinsman, Clark county, Missouri, and Mississippi railroad bonds and coupons, as described in memorandum book Exhibit "A?"

(Question objected to by plaintiff's counsel for assuming a deposit of bonds and coupons made by A. S. Tinsman.)

Answer. They were.

Re-examination by plaintiff's attorney:

Question 1. When did you last see John W. Morse?

Answer. Six or seven years ago.

Question 2. Have you seen him since the time you saw his brother in the auditor's office of the I. & St. L. R'road?

Answer. Yes.

302 Question 3. When did you last hear of John W. Morse, about?

Answer. Four years ago, about.

Question 4. What did John C. Noyes say concerning the books, records, and papers of the Western Construction Company when you inquired about them of him at — R. depot at Pana, Illinois?

(Question objected to by defendant's attorneys as incompetent and irrelevant.)

Answer. Said he did not know where they were.

Question 5. State the understanding, if any, with regard to the disposition of the bonds when they were taken from Bartholow, Lewis & Co. and handed to Tinsman at Morse's office.

(Objected to by defendant's counsel as immaterial, irrelevant, and incompetent, vague, and indefinite.)

Answer. The understanding was he was to deposit them somewhere, so we could get them when they were earned.

Question 6. Who were the parties to that understanding?

(Question objected to by defendant's counsel as immaterial.)

Answer. Mr. Tinsman and the Western Construction Company.

Question 7. State, if you know, how it was that the bonds and coupons refeferred to were taken to Pana.

(Question objected to by defendant's counsel as immaterial.)

Answer. In order that there might not be any more liens
303 of the old railroad company placed on them.

Section 8. State whether or not, at the time the bonds referred to were taken from Bartholow, Lewis & Co., you knew an injunction suit by Clark county against Bartholow, Lewis & Co. had ever been filed or was pending at that time restraining Bartholow, Lewis & Co. from delivering the bonds referred to.

(Question objected to by defendant's counsel as irrelevant, incompetent, and immaterial, and as assuming that a suit had been commenced or that there was such a suit pending.)

Answer. I did not.

Question 9. State whether or not, at the time the bonds were handed to Tinsman in Morse's office, the Western Construction Company had been secured for the notes given to Bartholow, Lewis & Co. to obtain said bonds.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent, and assuming that the Western Construction Company had given notes for the purpose of obtaining the bonds.)

Answer. There was no security given.

Question 10. State what means, if any, the Western Construction Company took to protect itself in the liability incurred in giving these notes to Bartholow, Lewis & Co.

304 (Question objected to by defendant's counsel, because irrelevant, incompetent, and immaterial.)

Answer. Mr. Tinsman agreed to place the bonds in a position where they could be obtained when earned.

Question 11. State where he agreed to place them, if any place was designated.

Answer. The final place chosen was here at Pana.

Question 12. State if it was under that agreement they were placed here.

(Question objected to by defendant's counsel, because irrelevant, immaterial, and incompetent, and not in rebuttal.)

Answer. It was.

Question 13. State whether or not at the time the bonds were placed in your hands by Tinsman there was any written agreement between yourself and Tinsman as to the disposition of said bonds.

(Question objected to as irrelevant, immaterial, incompetent, and not in rebuttal.)

Answer. There was not.

Question 14. State whether you could deliver said bonds to the Western Construction Company when earned without an order from A. S. Tinsman under the agreement under which the bonds were placed in your hands by Tinsman.

(Question objected to by defendant's counsel as irrelevant,
305 immaterial, and incompetent, and as calling for the opinion of the witness.)

Answer. They were to be delivered on the estimates of the railroad engineer.

Question 15. State whether you ever agreed with Mr. Tinsman to hold said bonds on his order.

(Question objected to by defendant's counsel as irrelevant, incompetent, and immaterial.)

Answer. No; I did not.

Question 16. State whether or not it was the understanding with Tinsman when the bonds were left with you that they were to be paid out on the estimates of the railroad engineer.

(Objected to by defendant's counsel as irrelevant, immaterial, incompetent, and assuming that the bonds depended on or — left with witness and calling for the opinion of the witness.)

Answer. It was the understanding of all of us.

Question 17. State whether or not you ever delivered any of said bonds to the Western Construction Company without an order from A. S. Tinsman, and, if so, was it with the knowledge of A. S. Tinsman?

(Question objected to as irrelevant, immaterial, and incompetent.)

Answer. Immediately after having done so I told Mr. Tinsman on the first estimates.

306 Question 18. State whether or not Mr Tinsman made any demur or objection to what you had done.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. He did not.

Question 19. State whether or not in your conversations with L. A. Coquard, or the attorneys for plaintiffs, you exhibited to them any order or orders drawn by A. S. Tinsman.

(Question objected to by defendant's counsel as irrelevant, immaterial, and incompetent.)

Answer. I don't think I do.

Question 20. State whether or not you stated to Coquard or his attorneys at any time the contents of any such order.

(Question objected to by def't's att'y as immaterial and incompetent.)

Answer. I don't think I did.

Question 21. State whether or not, at the time Mr. Tinsman placed the bonds in your charge, he made any suggestions as to the form of the memorandum to be given him.

(Question objected to by def't's counsel as irrelevant, incompetent, and immaterial, and as calling for secondary evidence.)

Answer. I don't think he did.

Recross-examination:

Question 1. In answer to question 16, re-examination-in-
307 chief, who do you mean by all of us?

Answer. I mean the Western Construction Company and Mr. A. S. Tinsman.

Question 2. When and where did you tell Tinsman that you had paid out some of the Clark county bonds on the first estimates, and what do you mean by the first estimates?

Answer. My impression is it was in St. Louis about April or May, 1873. I mean the first estimates of the railroad engineer.

Question 3. Why did you tell A. S. Tinsman that you had paid out a part of the Clark county bonds on the first estimate of the engineer?

Answer. I told him because we were talking about the railroad matters

(Signed) GROVE P. LAWRENCE.

Deposition of Albert Blair.

The plaintiff next called as a witness ALBERT BLAIR, who testified as follows:

I was secretary of the Missouri & Mississippi Railroad Company from 1869 until the present time, or while it was in existence. The book now shown me is the record of the proceedings of the board of directors of said corporation, kept by me, for the times therein specified.

308 Dr. A. S. Tinsman, whose deposition has been read, was a director in said corporation.

The plaintiff next read in evidence from said record of said corporation, page 92:

MARCH 20, 1874.

At the request of the Western Construction Company, who presented a certified estimate of work done in Clark county during the months of March, April, and May, 1873, amounting with incidental expenses to the sum of $65,801.50, and an order for $66,000 of Clark county bonds, signed by the secretary and president, on A. S. Tinsman, trustee, was given to said Western Construction Company.

ALBERT BLAIR,
Secretary.

Plaintiff also read from said record as follows, page 97:

MACON, MO., *April* 7, 1874.

The chief engineer, Charles Dabois, to-day furnishes an estimate of work done in Clark county during the months of June,
309 July, August, September, October, and November, A. D. 1873, with a statement of discount on Clark county bonds, both for the present and former estimate. The estimate has been approved by the president, and an order issued by him to A. S. Tinsman to pay to the Keokuk and Kansas City Railroad Company (the name having been changed from the Missouri & Mississippi Railroad Company to said Keokuk & Kansas City Railroad Company) the sum of one hundred and thirty-six thousand dollars in Clark county bonds.

The items of the estimate are as follows:

Expenses of engineering	$1,800 00
Sup't, general office, &c.	2,800 00
180,340 cubic yards of earth, &c.	54,102 00
21,450 " hard material	8,580 00
20,478 " earth hauled	1,622 24
Discount on bonds	34,452 12
Do. do. first estimate	32,902 75
	$136,249 11

ALBERT BLAIR, *Sec'y.*

310 *Deposition of A. S. Tinsman.*

The plaintiff next called as a witness A. S. TINSMAN, who testified as follows:

Q. Why did you deliver the $20,000 of coupons of Clark county to your brother-in-law, M. Roseberry?

A. From the fact that he was uneasy in regard to his being a security on my bond.

2 Q. Why should that circumstance have led you to deliver the coupons of Clark county if you held them as financial agent to Mrs. Roseberry?

A. To satisfy him that they were supposed to be worthless.

3 Q. There is a suit pending now against the securities on your bond by Clark county, is there not?

A. Yes, sir; there is.

4 Q. Did you ever receive from Roseberry any portion of the consideration which he received from Mr. Whitford for the purchase of these $20,000 of Clark county coupons?

A. Not to my knowledge.

5 Q. Why do you say not to your knowledge?

A. Because I didn't receive that.

6 Q. On your oath, did you not, or did your wife not, receive a portion of the consideration which Mr. Roseberry received
311 for the sale of these $20,000 of Clark county coupons?

A. My wife received some, sir.

7 Q. How did she come to receive—Amanda Tinsman—any portion of the proceeds of the $2,500 which Whitford paid for those coupons?

Counsel for defendant objected to the assumption that Mr. Whitford paid anything.

8 Q. Look at that check or draft and say if that was not given and endorsed by you for your proportion of the share of money paid Mr. Roseberry on the sale of these coupons in suit.

A. That was deposited in her favor.

9 Q. That is your name on the back?

A. Yes, sir.

10 Q. Then, that is your wife's name?

A. Yes, sir.

11 Q. Now, was not that draft drawn in payment of a portion of the consideration received from Mr. Roseberry of the $2,500 in the purchase of the Clark county coupons in suit?

A. Yes, sir.

12 Q. How did it come, then, that you or your wife should have received, if you turned these coupons, as you say you did, over to Mr. Roseberry, simply because he was surety on your bond, how did it happen that you or your wife should have received from
312 him any portion of the consideration he received for the sale of them to Mr. Whitford?

A. It was a matter between them.

13 Q. Between who?

A. My wife and Roseberry.

14 Q. Why did you endorse it?

A. Because I happened to be down there; I went after my daughter; she was sick.

15 Q. But how did it come to be payable to you if it was a matter between him and your wife, his sister?

A. It was taken out of the bank in that shape.

16 Q. You knew, at the time you received and endorsed this draft, that Roseberry was paying you a portion of the money he had received from Whitford on the purchase of these coupons?

A. Yes, sir.

17 Q. You were a creditor of the construction company, were you not?

A. No, sir.

18 Q. Was your wife a creditor of the construction company?

A. No, sir.

19 Q. How did you or your wife have a claim to any portion of the money which Rosberry received on the sale of those coupons?

A. Didn't have any claim.

313 20 Q. But he paid you the money, and you received it, you and your wife, on the claim that he was a creditor of the construction company?

A. I think he was—yes.

21 Q. Did you not deliver those coupons to him, under authority, as surety for the claim he had against the Western Construction Company?

A. No, sir; I did not.

22 Q. But you took the property you claimed to have been the property of Clark county, and turned it over to another party?

A. I delivered it.

23 Q. With your knowledge or without?

A. With my knowledge.

24 Q. How did she get possession of them?

A. She had possession.

25 Q. How did she get it—from you?

A. I gave them to her.

26 Q. Where did she get possession of them?

A. In my house.

27 Q. Why did you allow her to take possession of those coupons and receive a portion of the consideration for the sale of the coupons; can you explain that?

A. That part of it I have no real knowledge of.

28 Q. What part of it?

A. That transaction in regard to ——

314 29 Q. You knew when you endorsed that check?

A. Yes, sir.

30 Q. You know what it was given for?

A. Yes, sir.

31 Q. And you say you had no knowledge of that part of the transaction?

A. No, sir.

Mr. CLOVER: I now offer this in evidence:

"$1,150. Linn County Bank.

"S. D. Cady and Company, La Cygne,

"KANSAS, *September 26th*, 1881.

"Pay to the order of A. S. Tinsman, $1,150.

"(Signed) S. D. CADY.

"Drawn on the American Exchange National Bank of New York. Endorsed: A. S. Tinsman. Endorsed further: Pay to the Keokuk

Savings Bank or order, A. S. Tinsman. Pay to E. K. Knight, cashier, for account of Keokuk Savings Bank. Edward Johnson, cashier. (Signed Edward Johnson); and containing the mark of payment by the National Park Bank of New York."

32 Q. Dr. —— didn't you claim the Western Construction Co. owed you?

A. No, sir; I never claimed it.

33 Q. Didn't you claim the M. & M. Railroad Company owed you?

A. No, sir; never.

315 34 Q. Didn't you claim they owed you a commission for services?

A. They offered me a commission, but never paid it.

35 Q. You claimed it?

A. I claimed it, but had nothing to substantiate it.

36 Q. A commission for what?

A. For the disbursements of those bonds.

37 Q. Do I understand you claimed the Western Construction Company owed you?

A. No, sir; I had no claim; it was the railroad company that was to pay.

38 Q. You claim then the railroad company owed you?

A. They owed me by agreement.

39 Q. Did you ever get paid?

A. No, sir.

40 Q. Wasn't this money paid you on your claim against the M. & M. Railroad Company?

A. No, sir.

41 Q. Or paid your wife, Amanda?

A. No, sir.

Cross-examination by Mr. GLOVER, counsel for the defendant:

1 X Q. Dr. ——, who gave you this check for $1,150, to
316 which you have just referred; who gave it into your hands?

A. The banker at La Cygne, Kansas.

2 X Q. What had Mr. Cady to do with the transaction—anything?

A. Nothing, only he was Mr. Roseberry's depositor, I think.

3 X Q. Why did not Roseberry give you that check direct; why did he get the banker to do it?

A. I don't know, sir.

Mr. CLOVER: How did that book come into your possession?

Said bank-book entries are as follows:

Dr.	Exchange Bank in acc't with A. S. Tinsman, Ag't.				Cr.
1873.					
March 11.	To Clark Co. bonds for				190,000
6.	"	150	coupons on		6,000
6.	"	750	" 20 "		15,000
6.	"	100,	20		2,000
April 26.	"	50,	20		1,000

A. Mr. Lawrence gave me that book, as financial agent, in 1873.

4 X Q. I mean how did you get possession of this book the last time?

A. I have had that book in my possession all the time until within a few days; it is my own book.

317 5 X Q. Didn't you return this book at the time you got the $20,000 of coupons from Lawrence and when everything had been drawn out of his bank; didn't you return that book to Lawrence?

A. No, sir.

6 X Q. Was there any reason why you should have kept that book after all the deposits had been drawn?

A. Yes, sir.

7 X Q. Well, why?

A. Because — the estimates; he only got $147,000 in estimates; that was all, and there was $54,000 of bonds that the bank owed me that he gave.

8 X Q. He did get $140,000 of estimates?

A. Yes, sir; $147,000, I think.

9 X Q. You drew an order in favor of the Western Construction Company for the payment of $147,000?

A. I drew, to the best of my recollection, on the Missouri and Mississippi Railroad Company to pay.

10 X Q. One further question: Didn't you privately take this book, after you surrendered it to Lawrence, out of his possession without his knowledge?

A. It never was surrendered at all, sir; it was in my possession all the time.

318 Mr. CLOVER: I only mention it because he has sworn you gave it back to him.

Mr. GLOVER: Defendant's counsel exhibits to the witness an agreement in writing purporting to be signed A. C. Vanderwater, pres.; F. A. Jones, sec'y; S. E. Vanderwater (seal), G. P. Lawrence (seal), J. W. Morse (seal), John Fogit (seal), John C. Noyes (seal), F. A. Jones (seal), and asks the witness to state what he knows about that paper.

A. This paper was written in 1873, I think March some time, at the Southern Hotel here, at the time the bonds were drawn from Bartholow, Lewis & Co.

11 X Q. Did you see it signed?

A. I did; yes, sir.

12 X Q. Did you see every man put his signature there whose name appears there?

A. I was present when it was signed and they were signing it; I can't say I saw every individual sign it.

13 X Q. Do you know the signatures?

A. I know the signatures.

14 X Q. To be genuine?

A. To be genuine.

15 X Q. You have seen them all write?

A. Yes, sir; I have seen them all write. Those signatures are all genuine.

Mr. SHEPLEY then read the following:

319 This agreement, made and entered into by and between the Construction Company and the undersigned with A. S. Tinsman, as follows, to wit: That in case said Tinsman withdraws the Clark county bonds from Bartholow, Lewis & Co. and deposits the same with G. P. Lawrence, then and in that case the said company and the undersigned hereby agree to save said Tinsman and his sureties harmless by reason of said change of deposit.

It is further agreed hereby that said bonds of Clark county shall be expended in accordance with the terms of the order subscribing the same, and in no other way, and that the same, or the proceeds of the sale thereof, shall be drawn from said trustee and said depositor in accordance with said order.

For the faithful performance of the foregoing we hereby bind ourselves in the sum of $200,000 to said Tinsman and his sureties.

The said Construction Company have signed the foregoing instrument by the president and secretary, and the individuals by their own hand and seal.

Western Construction Company, by A. C. Vanderwater, F. A. Jones, and then it is signed by the signatures we have proved, Lawrence, Morse, Fogit, and Noyes.

320 By Mr. ROWELL:

16 X Q. When did you deliver these Clark county bonds to Bartholow, Lewis & Co.?

A. They were deposited there a few days after their subscription; I don't recollect the time.

17 X Q. About the date of the bond?

A. Yes, sir.

Mr. GLOVER: Delivered by you?

A. Yes, sir.

18 X Q. But to your credit?

A. Yes, sir.

19 X Q. And as financial agent?

A. Yes, sir.

And the case having been submitted to the court on the 9th day of October, A. D. 1882, it made the following finding of facts, viz:

Judgment.

L. C. WHITFORD, Plaintiff,
vs.
COUNTY OF CLARK, Defendant. } 1934.

Now again come the parties by their attorneys, the plaintiff by Messrs. Fisher and Rowell, and the defendant by Messrs. Glover and Shepley, and this cause having been heretofore submitted to the court, without the intervention of a jury, upon the pleadings, proofs,

and arguments of counsel, upon consideration whereof, and
321 being now fully advised in the premises, the court finds the facts herein for the defendant, and orders that judgment be entered accordingly upon said finding of facts.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, The County of Clark, go hence without day and have and recover of the said plaintiff, L. C. Whitford, its costs in this behalf expended, and that a fee-bill or execution issue therefor.

And on the 9th day of October, A. D. 1882, and within four days, the plaintiff filed the following motion for new trial in the words and figures as follows, to wit:

Motion for New Trial.

In the United States Circuit Court, Eastern District of Missouri.

L. C. WHITFORD, Plaintiff,
vs.
THE COUNTY OF CLARK, Defendant.

And now comes the plaintiff and moves the court to set aside its judgment and grant a new trial in this case for the following reasons, to wit:

First. Because the court admitted improper, illegal, and incompetent testimony offered by defendant.

Second. Because the court refused to admit competent and
322 legal testimony offered by plaintiff.

Third. Because the court admitted the evidence of witness N. Y. Cherry against the objection of plaintiff, the said evidence being by way of deposition of said witness, when the said witness was in attendance on the trial of said cause, and present in court, and which fact was brought to the knowledge of the court.

Fourth. Because the finding of the facts by the court as against the evidence introduced in the case.

Fifth. Because the court did not find all the facts given in evidence which were material to a determination of the issues.

Sixth. Because, under the finding of facts, the judgment of the court was against the law applicable to the case.

Seventh. Because the decision was against the evidence.

Eighth. Because, under the law and the evidence, the judgment should have been for the plaintiff.

FISHER & ROWELL,
H. A. & A. C. CLOVER,
For Plaintiff.

323 And on the 26th day of October, A. D. 1882, the court overruled said motion for new trial, to which action of the court the plaintiff then and there excepted, and prays that this bill of exceptions may be allowed and filed of record, which is done on this the first day of November, A. D. 1882.

(Signed) SAMUEL TREAT, *Judge.*

On the hearing of said cause the following opinion was delivered by Honorable Samuel Treat, judge, to wit:

324 Judge Treat rendered the following opinion and judgment yesterday in the U. S. circuit court:

L. C. WHITFORD *vs.* CLARKE COUNTY.

The court sitting without the intervention of a jury in the trial of this cause finds the facts to be:

That the said county subscribed, in the year 1871, for 2,000 shares of the capital stock of the Missouri and Mississippi Railroad Company, to be paid in the bonds of said county at par, running for the term of 20 years, and bearing interest at the rate of eight per cent. per annum; said bonds, or the proceeds thereof, to be used in the construction by said company of that part of the railroad lying within said county. The county was, under said contract of subscription, to deliver its bonds forthwith to a financial agent to be chosen by its county court, who was to give his bond as agent, subject to the approval of the company and of the court, for the use of the county and of the company, conditioned for the faithful performance of his duties as such agent, he to have power to sell the bonds through the St. Louis bond and stock board, or through Bartholow, Lewis & Co., bankers of St. Louis, and to pay over to the railroad company the said bonds, or the proceeds of the sale thereof, on the order of said railroad company, as fast as the work progressed on the railroad in said county, each payment to include all work and necessary expenses expended in said county to the date of said payment.

The bonds, with interest coupons annexed, were accordingly delivered to one Tinsman, who had been duly appointed such financial agent, and given his official bond conditioned and approved as required. The county also appointed an agent to vote its stock and received a certificate therefor. Said financial agent deposited the bonds and coupons with Bartholow, Lewis & Co.

The railroad company entered into a contract with a construction company, in 1872, to build the road and to receive in part payment therefore the bonds of Clark county. At the instance of said construction company the county bonds and coupons then in possession of Bartholow, Lewis & Co. were removed to and deposited with the Exchange Bank at Pana, Ill., in 1873, said construction company, with sureties, indemnifying said Tinsman, the financial agent, for said removal, and making provision also for a lien said Bartholow, Lewis & Co. had on said bonds and coupons to the amount of about $30,000. There were deposited with said Exchange Bank, in 1873, to the credit of said Tinsman, agent, Clark county bonds to the amount of $190,000 and detached coupons to the amount of $24,000.

The construction company obtained and used the bonds, but never did all the work required, nor did the railroad company; the construction company and the Exchange Bank failed. The coupons in suit continued in the possession of the former president of said bank after its failure until the year 1878, when he delivered them

to said Tinsman, the said financial agent. Said Tinsman retained possession of them until 1881, when he delivered them, without consideration, to his brother-in-law, Roseberry, who was one of the sureties on his (Tinsman's) official bonds. At that time Clark county was negotiating with its bondholders for a compromise on its bonds and coupons issued for its subscription to said railroad stock, as heretofore stated. The coupons in suit had been for many years detached from the bonds and treated as a distinct and matured obligation. The plaintiff through his agents negotiated for and bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, sister of Roseberry, received from Roseberry $1,150.

The condition of said coupons and the general facts and circumstances of the controversy between the bondholders and Clark county concerning the alleged fraudulent issue of the bonds and coupons were known to the plaintiff when he bought the coupons in suit.

Whereupon the court declares that the plaintiff is not entitled to recover, and orders judgment for the defendant.

On the allowance of the writ of error in said cause the following bond — approved and filed:

324½ Know all men by these presents that we, L. C. Whitford, as principal, and L. A. Coquard, as security, are held and firmly bound unto The County of Clark, State of Missouri, in the full and just sum of five hundred —, to be paid to the said County of Clark; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 1st day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the September term, 1882, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between L. C. Whitford, plaintiff, and The County of Clark, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said County of Clark citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said L. C. Whitford shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

L. C. WHITFORD, [SEAL.]
By FISHER & ROWELL, *Att'ys.* [SEAL.]
L. A. COQUARD. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

325 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proofs in case No. 1934 of L. C. Whitford, plaintiff, against The County of Clark, in the State of Missouri, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this tenth day of January, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *Deputy.*

326 In the Supreme Court of the United States.

LOT C. WHITFORD, Plaintiff in Error,
vs.
THE COUNTY OF CLARK, STATE OF MISSOURI, Defendant in Error. } No. —.

It is hereby stipulated & agreed that in printing the record in this case—that in printing the petition which appears in full in the record—only one of the counts thereof shall be printed, & that the remainder of said counts are the same in form, except as to the maturity of the coupon sued upon.

CLINTON ROWELL &
H. A. CLOVER,
For Plaintiff in Error.
THOS. J. C. FAGG,
For Def't in Error.

[Endorsed:] Supreme Court U. S., 1884. October term. No. 630. T. C. Whitford, pl'ff in err., *vs.* The County of Clark. Stipulation to omit portions of record in printing. [Stamped:] Office Supreme Court U. S. Filed Oct. 27, 1884. James H. McKenney, clerk.

Endorsed on cover: E. Missouri C. C. U. S. No. 327. L. C. Whitford, plaintiff in error, *vs.* The County of Clark. Filed 4th October, 1883.

119-522

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

L. C. WHITFORD,
Plaintiff in Error,
vs.
THE COUNTY OF CLARK, MISSOURI,

No. 327.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

FISHER & ROWELL,
H. A. CLOVER,
Attorneys for Plaintiff.

Pierce Bros., Printers, 118 N Third Street, St. Louis, Mo.

The bonds issued were of the denomination of five hundred and one thousand dollars, and bore interest at the rate of eight per cent. payable semi-annually, with coupons attached for the payment of interest at said rate, the coupons being for the payment of twenty and forty dollars, as attached to either of the denominations of said bond. The coupons sued on were eight hundred in number, six hundred being for the payment of twenty dollars each, and two hundred for the payment of forty dollars each, and particularly described on page 10 of Record.

The bonds in question were perfectly valid securities, obligations of the county.

As to their history:

Vide U. S. v. Clark Co., 95 U. S. 769.
Ibid 96 U. S. 211.

The answer of defendant does not allege to the contrary. It merely pleads *nil debet* to plaintiff's cause of action; that plaintiff never owned the *bonds*, or *any of them*, mentioned in the petition; that the *coupons* sued are not, or is either of them, the act or deed of the county. That the county never delivered the coupons in suit, or any of them, to plaintiff or any person as its act and deed.

That no consideration was ever received by the county from any person on account of the coupons; that plaintiff is not the holder of said coupons for value; that at the day when the said coupons passed out of the possession of the county the same were the property, and ever since has been the property, of the county; that the same immediately came to the possession of plaintiff from the agent of the county, and had then been long due and dishonored. Record, page 6.

The county court, acting for the county, subscribed for two thousand shares of the capital stock of the railroad corporation. Page 18 of printed Record.

A financial agent, so-called, was appointed by the court, and the court required of him, the agent, to execute a good

and sufficient bond, to be approved by the court and railroad company, to be made payable to the State of Missouri for the use of Clark County, Missouri, and the Missouri & Mississippi Railroad Company, and either of them, and conditioned for the faithful performance of his duties as such agent. Record, page 19. The financial agent had power to sell said bonds through the Saint Louis Bond and Stock Board, or through Bartholow, Lewis & Company, bankers, of St. Louis, Missouri, and pay over to said railroad company the said bonds or the proceeds of the sale thereof, on the order of the said company, as fast as the work progressed on said company's railroad in Clark County. The railroad company was required to deliver a certificate of paid up stock for the full amount of the subscription when the bonds were placed in the hands of the financial agent.

And a person was appointed to vote the stock of the county, and one A. S. Tinsman was appointed financial agent. See page 17 printed Record.

The bond of the agent was given. Page 19 of Record. Stock subscribed and bonds delivered to the agent. Page 21.

Tinsman was a director likewise of the railroad company.

The railroad company contracted with the Western Construction Company to construct the road, build side-tracks, and stock it from Keokuk to Kansas City. Page 47, Record. And the bonds were delivered by the financial agent to the construction company, upon the orders of the company.

They used a portion of them as collaterals to borrow money East—fifty thousand dollars. Sold fifty thousand dollars through the St. Louis Stock Board to Mr. Grant; used one hundred thousand of them as collateral with Waterman & Beaver for the purchase of iron. This accounts for the whole issue of $200,000.

The bonds were delivered upon the order of the railroad company at its request upon a certified estimate of work

done in Clark County, during the months of March, April and May, 1873, amounting, with incidental expenses, to the sum of $65,801.50, and on order for $66,000 of the bonds, and upon estimate of work done in Clark County, during the months of June, July, August, September, October and November, A. D., 1873, including the discount on bonds, for $136,249,11. See page 66 of Record.

These estimates absorbed the whole amount of issue of bonds by Clark County.

The name of the railroad company was changed to that of the Keokuk & Kansas City Railroad Company.

By reason of financial embarrassment, general throughout the country, it appears that the construction company failed, as did the railroad corporation itself.

The particular coupons in suit were purchased by the plaintiff through his broker, Coquard, of one R. H. Roseberry, who received them from Amanda Tinsman, his sister, about June, 1881, at St. Francisville, Clark County, (p. 35, of record).

They were put in her possession about 1877, and retained by her until 1881. These bonds in their entirety, with their coupons attached, were delivered by the agent to Bartholow, Lewis & Co., for sale, doubtless.

Bartholow, Lewis & Co., made advances on them, at the request of the interested parties, of from $28,000 to $36,000. The Western Construction Company, upon the order of the railroad company, obtained them from Bartholow, Lewis & Co., by giving its individual notes to Bartholow, Lewis & Co., for the advances made by that house to the railroad company (p. 50, Record.)

They were then transferred from Bartholow, Lewis & Co. to the Exchange Bank at Pana, Illinois, and put in the vaults of the Exchange Bank. The object of this was to prevent any more difficulty in drawing the bonds when they were earned. At the time of their transfer, there were some coupons detached from the bonds, and while in the Exchange Bank some were detached after the construction company

had drawn them to the amount altogether of some $25,000 or $26,000. Some of these detached coupons went with the bonds they belonged to. Some of them were given to A. S. Tinsman; and of the coupons given to Tinsman a portion were those that were detached from the bonds when said bonds were left in the Exchange Bank, and some were detached afterwards by the treasurer of the Western Construction Company. (Rec., p. 51.)

These coupons were subsequently given by the treasurer to Tinsman, who brought a memorandum book (hereafter mentioned), and, as testified to by Tinsman, were by him deemed worthless and were given by him to Tinsman, who said, when he called for them, that Clark County was after him, and talked of being sued on his bond as financial agent, and was told if he could raise anything on them to take them, that he had done his duty and to fight the county. There was no authorization of the construction company in the delivery of these coupons to Tinsman, and the treasurer of the company testified that if he had considered the coupons as of value they would have been used as assets of the Western Construction Company. At the time of the deposit of the bonds and coupons with the Exchange Bank, the president of the bank, who was also a director of the construction company, gave to Tinsman a small memorandum book which showed the deposit thus:

Dr. Exchange Bank in acct. with A. S. Tinsman, Agt., Cr.

1873.

March 11,	To Clark County	bonds	for			$190,000
March 6,	To Clark County	150	coupons,	40		6,000
March 6,	" "	750	"	20		15,000
March 6,	" "	100	"	20		2,000
April 26,	" "	50	"	20		1,000

(Rec., p. 69.)

The time of the delivery of these Clark County bonds to Bartholow, Lewis & Co. was a few days after the subscription by the company.

At the time of their delivery to Mr. Lawrence, the following agreement was made:

"This agreement, made and entered into by and between the Construction Company and the undersigned with A. S. Tinsman, as follows, to-wit: That in case said Tinsman withdraws the Clark County bonds from Bartholow, Lewis & Co., and deposits the same with S. G. Lawrence, then and in that case said company and the undersigned hereby agree to save said Tinsman and his sureties harmless by reason of said change of deposit. It is further agreed hereby, that said bonds of Clark county shall be expended in accordance with the terms of the order subscribing the same, and in no other way, and that the same, and the proceeds of the sale thereof, shall be drawn from said trustee and said depositor in accordance with said order. For the faithful performance of the foregoing, we hereby bind ourselves in the sum of $200,000 to said Tinsman and his sureties."

The said construction company have signed the foregoing instrument by the president and secretary, and the individuals by their own hand and seal. Western Construction Company by the president and secretary, and by Messrs. Lawrence, Morse, Fogit and Noyes.

The trustee named herein was, of course, Mr. Lawrence, and the depositor, Mr. Tinsman.

The bonds and coupons were placed in the Exchange Bank at Pana, in order that there might not be any more liens of the old railroad company placed on them (p. 63, record); were deposited in that bank on the same day the company gave its notes to Bartholow, Lewis & Co., (p. 56, record); they were drawn out of the Exchange Bank and went to the construction company on estimates in accordance with the contract with the railroad company (p. 58 of record). Mr. Lawrence delivered the bonds on the estimates of the railroad engineer, and it was understood they were to be delivered on such estimates. (Rec., p. 58.)

These bonds were, by the contract with the railroad company, to be delivered to the construction company upon the estimate of the railroad engineer. The construction company got the bonds, all of the bonds. They used a portion of them as collaterals to borrow money East—$50,000. There were sold $50,000 through the St. Louis Stock Board to Mr. Grant; $100,000 were used as collateral with Waterman & Beaver, of Philadelphia, for the purchase of iron. Pages 48 and 49 of Record. The coupons thus being in the possession of the construction company, Mr. Roseberry obtained them under these circumstances. He states: (page 36 Record.) "About May, 1873, or 1874, at the circuit court of Chariton County, Missouri, Keytesville, the county seat, I was, at that time, a creditor of the company, building or constructing the Missouri & Mississippi Railway. A portion of the railway, completed from Glasgow to Salisbury, Missouri, was sold at that term of the court, under a lien or judgment in favor of Mr. Lewis. That sale of the road cut out a part of the creditors, myself among the number. I then demanded or Mr. F. A. Jones, attorney for the company, some security for the amount due me from the company. He said there were $20,000 in coupons that the company was willing that Tinsman and myself should have to secure us. Tinsman knew that one-half of these coupons were intended for me as collateral for my debt, if they were of any value. At that time, by an agreement between myself and Tinsman, his wife, my sister, was to be the custodian of said coupons. Record, page 37. Roseberry's claim, as creditor of the construction company, existed upon two notes for thirteen hundred and thirty-three dollars, each signed by Vandewater, president of the construction company, given for goods and supplies furnished the men on the work of said construction company, and the balance was for goods furnished and time check purchases, making, with interest on notes, about five hundred dollars. Page 38 of Record. These notes were put in judgment, but he never received anything upon them. Page 41 Record. The

coupons were delivered to Mrs. Tinsman, under the agreement between Roseberry and Tinsman about 1877, and she had them in her possession in 1881. Page 43 Record. They were delivered to her by Dr. Tinsman, at St. Francisville, Mo. Page 44 Record."

He further testified, being asked what Tinsman, the agent, said to him at the time he delivered the coupons: "That he was disgusted with the whole matter, and for his "part was willing they should be turned over to the county."

Mr. LAWRENCE, perfectly disinterested, testifies that Mr. Tinsman agreed to place the bonds in a position where they could be obtained when earned. The final place was chosen at Pana. They were to be delivered on the estimates of the railroad engineer. There was no agreement to hold the bonds on the order of Tinsman. It was the understanding of all parties they were to be paid out on the estimates of the railroad engineer; they were delivered without order from Tinsman, but of which he was immediately informed, and without objection on his part.

Tinsman, having obtained the coupons in suit from Lawrence, president of the Exchange Bank at Pana, delivered them to Roseberry, as he says, from the fact that he, Roseberry, was uneasy in regard to his (Roseberry's) being a security on the bond (of Tinsman given to the county), and being asked why that circumstance should have led him to deliver the coupons, if he held them as financial agent to Mrs. Roseberry, his sister, answers: To satisfy him (Roseberry), that they were supposed to be worthless. Page 66 of Record.

At the same time he admits the pendency of a suit against him, and the securities upon his bond.

And that his wife received a portion of the consideration paid by Whitford, the plaintiff, for the purchase of the coupons. Pages 67, 68, Record.

BARTLETT testified, pages 29 and 30 of record: That he was acquainted with one-half or two-thirds of the north-eastern part of the surveyed line of what was known as the Missouri and Mississippi railroad—its beginning, course and termination in Clark County since its survey. That most of the length of the line of which he had knowledge, has all the time remained in a state of nature without any work, he supposes there has been work done on some three or four miles of the road; is not very definite as to length, and that done soon after the survey in 1872 or 1873. There has been no work done on said road since its abandonment in 1872 or 1873. In his opinion, not over $15,000 worth of work has been done in all.

The entire work on said road has been abandoned through Clark County altogether since 1873, and, probably, the latter part of 1872. Witness knows about the time the County Court made a subscription of bonds to the Missouri and Mississippi Railroad Company of $200,000, and, in answer to question propounded, testified: "It having been rumored that the court *were* about to subscribe stock at the term of the court immediately preceding the term at which the stock was taken, from six to ten hundred, mostly leading tax-payers of the county, assembled at the court house, where the court *were* sitting, their purpose being to prevent, by any means, said subscription. At that meeting, mainly outside the court house, speeches were made in opposition to the subscription, and, I think, all there assembled denounced the supposed purpose of the court to subscribe as a high handed fraud on the county, and ended in sending a committee to the court to earnestly remonstrate against said subscription, and to extort a promise from the court that it should not then, or at any subsequent time, be made without the consent, expressed by vote, of the county; and upon the court's personal assurance that such subscription would not be made at that or any other time without the consent of the people, the parties went home satisfied, believing it would not be done. Several informal meetings,

and one pretty largely noticed, were had subsequent to the issuing of the bonds, with known purpose to resist the collection of taxes for the payment of interest, and to resist the bonds. These meetings and gatherings of the people were of sufficient public notoriety to advise every one of their nature and character in the county; nearly the entire mass of voters in the county were in arms against their issue, and these meetings were represented by leading tax-payers from every township in the county. N. T. Cherry and R. H. Roseberry had knowledge of these meetings, every man in the county had knowledge of them, at least the knowledge was general throughout the county."

The plaintiff objected to this testimony on the ground that it was irrelevant, immaterial and incompetent. The court deemed otherwise, and overruled the objection, to which the plaintiff duly excepted. The same character of testimony is found in the deposition of N. T. Cherry, page 23 of record, and it was upon this testimony that the court based its finding "That the conditions of said coupons and the "general facts and circumstances of the controversy between "the bondholders and Clark County, concerning the alleged "fraudulent issue of the bonds and coupons, were known "to the plaintiff when he bought the coupons in suit."

NATHANIEL T. CHERRY's testimony was as follows, pp. 23 and following, Record:

Was familiar with subscription bonds, commonly known as M. & M. bonds, of Clark County; what was commonly said or talked about concerning them; also know that the road was never built for which the bonds were subscribed. Know of meeting of tax-payers of the county in regard to said subscription; attended one or more meetings, perhaps, they were held in 1876-7 or 1878; judging from those he came in contact with, the people were opposed to the subscription, and that was the general impression of the peo-

ple of the city; the general opinion was that the bonds were fraudulently issued; had knowledge of what the people said generally, and what the feeling was. In October, 1880, had been engaged as attorney or agent in relation to the litigation concerning the bonds, either for or against Clark County; was employed as attorney for certain holders of the bonds, and acted from that time on in that capacity. I have seen the coupons in suit; first saw them about the middle of September, 1881, in the possession of, or controlled by, R. H. Roseberry. They represented a face value of $20,000; made an offer for them and they were placed in the bank about the 20th of September, 1881, or later, to be transferred, on the payment of the money, to Roseberry; made a contract for their sale. They were placed in the bank, and when the price agreed on was paid, they were to be forwarded as directed; bought them as agent. The money was to be paid by Whitford or Coquard; Roseberry signed a written contract; Coquard was acting as agent for bondholders; acted as attorney in the compromise by the county with bondholders, for bondholders; have been employed as attorney in the present suit; handed the bill of sale or contract referred to as made with Roseberry in reference to the coupons in suit, to Mr. Rowell, attorney, some two or three weeks after the purchase of the coupons had been affected, some time in October, 1881. The coupons were sent to Coquard for inspection; telegraphed to Coquard that the coupons had been bought and to send the money, Coquard acted in the compromise of M. & M. bonds made by the County Court of Clark County, in November, 1881, as agent of the bondholders; witness acted as the agent of Coquard and signed the contract as his attorney to compromise the bonds in November, 1881, and was acting during the spring, summer and fall of 1881 in aiding and assisting the said Coquard, as his agent, in making a compromise of a series of bonds commonly known as

the Clark County M. & M. bonds and about $200,000 in amount.*

No abstract of the testimony of B. E. Turner, page 33, of Record, because it is wholly immaterial. It establishes, however, that Mr. Coquard knew of the effort being made to compromise the bonds; knew of these $25,000 of coupons being out; was acting in the compromise; and that Coquard, in an interview with witness and others, stated that the compromise ought not to fail because of the inability to get in these coupons, and, in endeavoring to bring about the compromise, said the county was not legally bound to pay the coupons, because the bonds from which the coupons were detached were not delivered until 1874.

Witnesses Jordan, page 30, Record, McCoy, page 31 and Stafford page 32, merely testified to the condition of the road, how much thereof had been built and their opinion as to amount of work done.

The court found these facts upon the evidence to be as follows (pp. 73, 74 of record):

L. C. Whitford v. Clark County; the court, sitting with-

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* In justice to the plaintiff in the case, it should be stated all the testimony by depositions was taken under one notice on the 2d day of March, 1882, on service of notice 13th of February, 1882 (pp. 2 and 23 of Record).

A few days prior to the day fixed for the taking, by reason of sudden, unusual and extraordinary rains, causing the overflow of the Mississippi and Des Moines rivers and the submerging of a large area of country, railroad travel was intercepted and railroad communication entirely cut off between St. Louis and the place of taking the testimony, making it absolutely impossible to reach Kahoka in time to attend the taking of testimony, as was intended and desired. The telegraph was brought in operation, and request made to postpone the taking of the testimony under the notice for a few days, until the subsidence of the water would permit railroad communication to be renewed. This was denied, and the taking of testimony proceeded with. An attempt was made, by telegraphic communication, to secure the services of an attorney to cross-examine the witnesses, and, after much difficulty and under such circumstances, the services, such as he could afford, of an attorney were procured. Many or most of the witnesses had then already been examined and left for their homes, and the plaintiff was without the benefit of a cross-examination of these witnesses. The latter will explain how and why the plaintiff appears to have been represented on the cross-examination of the witness Roseberry (p. 29 of Rec.), and not as to other witnesses.

out the intervention of a jury in the trial of this cause, finds the facts to be:

That said county subscribed in the year 1871 for 2,000 shares of the capital stock of the Missouri and Mississippi Railroad Company, to be paid in the bonds of said county at par, running for the term of twenty years and bearing interest at the rate of eight per cent. per annum; said bonds, or the proceeds thereof, to be used in the construction by said company of that part of the railroad lying within said county. The county was, under said contract of subscription, to deliver its bonds forthwith to a financial agent to be chosen by its county court, who was to give his bond as agent, subject to the approval of the company and of the court, for the use of the county and of the company, conditioned for the faithful performance of his duties as such agent, he to have the power to sell the bonds through the St. Louis bond and stock board, or through Bartholow, Lewis & Co., bankers of St. Louis, and to pay over to the railroad company the said bonds or the proceeds of the sale thereof, on the order of said railroad company, as fast as the work progressed on the railroad in said county, each payment to include all work and necessary expenses expended in said county to the date of said payment.

The bonds, with interest coupons annexed, were accordingly delivered to one Tinsman, who had been duly appointed such financial agent, and given his official bond, conditioned and approved as required. The county also appointed an agent to vote its stock and receive a certificate therefor. Said financial agent deposited the bonds and coupons with Bartholow, Lewis & Co.

The railroad company entered into a contract with a construction company in 1872 to build the road and to receive in part payment therefor the bonds of Clark County. At the instance of said construction company, the county bonds and coupons then in possession of Bartholow, Lewis & Co. were removed to and deposited with the Exchange Bank at Pana, Ill., in 1873, said construction company, with sureties, indemnifying said Tinsman, the financial agent, for said removal, and making provision also for a lien said Bartholow, Lewis & Co. had on said bonds and coupons to the amount of about $30,000. There were deposited with said Exchange Bank in 1873, to the credit of said Tinsman, agent, Clark County bonds to the amount of $190,000, and detached coupons to the amount of $24,000.

The construction company obtained and used the bonds, but never did all the work required, nor did the railroad company, and the Exchange Bank failed. The coupons in suit continued in possession of the former president of said bank after its failure until 1878, when he delivered them to said Tinsman, the said financial agent. Said Tinsman retained possession of them until 1881, when he delivered them, without consideration, to his brother-in-law, Roseberry, who was one of the sureties of his (Tinsman's) official bonds. At that time Clark County was negotiating with its bondholders for a compromise on its bonds and coupons, issued for its subscription to said railroad stock as heretofore stated. The coupons in suit had been for many years detached from the bonds and treated as a distinct and matured obligation. The plaintiff through his agents negotiated for and bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, sister of Roseberry, received from Roseberry $1,150.

The condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit.

Whereupon the court declares that the plaintiff is not entitled to recover, and orders judgment for the defendant.

And rendered judgment for the defendant.

The plaintiff moved for new trial, assigning as grounds that the court admitted illegal testimony, and refused to admit legal testimony; admitted the deposition of Cherry, a witness present in court. That the finding was against the evidence. That the court did not find all the facts material to a determination of the cause, because under the finding the judgment of the court was against the law and the evidence, and because thereon the plaintiff was entitled to judgment. (Rec. p. 72.)

The motion was overruled and exception duly taken in the matters complained of, and writ of error sued out to this court.

ASSIGNMENT OF ERRORS.

The plaintiff assigns for error the admission of the testimony of N. T. Cherry, taken in Clark County, Missourl, more than one hundred miles from the place of holding the court where said witness resided.

The deposition of the witness was taken on the 2d day of March, 1882.

The case was tried on the 6th day of October, A. D. 1882, and the witness was, at the time of trial, present in court. (Rec., p. 22.)

The plaintiff assigns for error the admission of the testimony of Bryan Bartlett, as irrelevant, immaterial and wholly incompetent. (Rec., pp. 28, 29, 30.)

The plaintiff assigns for error that the court did not find facts upon the evidence which were material for a determination of the cause so as to conclude that the plaintiff was not entitled to recover, and that defendant was not entitled to judgment.

The plaintiff assigns for error that the court rendered judgment for defendant when it should have rendered judgment for plaintiff.

BRIEF OF THE ARGUMENT.

I.

The deposition of the witness Cherry should not have been allowed to be read as evidence.

In Missouri the declared law is "that when a deposition "it taken on notice, it can not be read if the witness is "present."

A. D. 1883, Chapman v. Kerr, 80 Mo. 163.

Is there any reason in the idea that we may make the witness our own?

In Missouri, the law is that a party may cross-examine an adversary witness generally.

The deposition was inadmissible under the statute of the United States, it not appearing to the satisfaction of the court that the witness was then dead, or gone out of the United States, or (gone) to a greater distance than one hundred miles from the place where the court was sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he was unable to travel and appear at court.

§865, R. S.

It is considered that if a witness, who, at the time of giving his testimony under commission, is a resident over one hundred miles from the place of the sitting of the court, should afterwards, and before trial remove his residence within the limit or to the very place of trial, and this fact made to appear to the court, the deposition of such witness, taken under such circumstances, could not, upon objection, be read in evidence.

Russell v. Ashley, Hempstead, 546.
Merrill v. Dawson, *Id.* 563.
Pettibone v. Deringer, 4 Wash. C. C. 215.

II.

The testimony of witness Bartlett was wholly and entirely irrelevant, immaterial and incompetent. A mere reference to this testimony, as appears on pages 29 and 30 of Record, shows the utter incompetency of this testimony, and yet it was upon such testimony that the court, in the finding of the facts, found thus:

"The condition of said coupons, and the general facts "and circumstances of the controversy between the bond-"holders and Clark County, concerning the alleged fraud-"ulent issue of the bonds and coupons, were known to the "plaintiff when he bought the coupons in suit."

What part of the evidence might have fit the case was not warranted by any plea pleaded, and the other portion was, in every sense, incompetent and immaterial.

III.

The finding of the court that the condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County, concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit, in no sense warranted the judgment of the court, but, on the contrary, with the other facts found, entitled the plaintiff to judgment. It was an immaterial finding, responding to no plea pleaded, and determining no fact in the case upon which to base judgment. What was the condition of said coupons referred to in the finding? They were past due and unpaid. What was the controversy between the bondholders and Clark County? Simply the usual controversy, the one party desiring to obtain payment, and the other to escape payment. As to the alleged fraudulent issue of the bonds and coupons, it is unquestionable that the bonds and coupons were validly and lawfully issued. The county had authority to subscribe to the capital stock of the company, and to issue bonds in payment of subscrip-

in blank, or of a negotiable instrument payable to bearer, is itself evidence of his right to present it and demand payment thereof. And payment to such person will always be valid unless he is known to the payor to have acquired possession wrongfully.

Possession and title are one and inseparable. Whenever the construction company sues us for these coupons, we will answer to it for our possession and title. For the present, and so far as Clark County is concerned, it is liable upon the coupons to some one—and we say to us, and to no one else.

These bonds and coupons were accepted by the construction company. They were then lawfully made, issued and delivered and accepted. In this position and condition they were valid and binding obligations of the county, subject to no defence in the hands of any one. How, then, can the mere act of Mr. Lawrence, without any authority from any one in surrendering the coupons to Mr. Tinsman, whether agent of the county or the railway company, or of both, or not, affect the prior delivery of the coupons, and re-vest the title to them in the county, so as to require a re-issue or re-delivery of them by the county before they could become anew of binding character upon the company.

The bonds were all disposed of to the construction company, and the coupons, although detached, were mere incidents of the bonds and belonged to the construction company, were its property in the hands of Mr. Lawrence.

It would be difficult to maintain that Roseberry could not have recovered upon these coupons. They were delivered to him with the consent of the company as security for the money due and owing by the company for goods and supplies furnished the men on the work of the construction company, evidenced by notes of the company and other good considerations rendered the company.

IV.

The coupons being attached to the bonds, were delivered by the county through its agent to the Western Construction Company before the maturity of any of them, and so that company had valid title to the same, and could recover upon the same, and if so, so could any transferee of the construction company, mediate or immediate.

These coupons did not lose their negotiable character by being dishonored for non-payment. They could still pass from hand to hand *ad infinitum* until paid. They retained their commercial attributes and circulated as such. To be sure that the transferree acquired nothing but the actual right and title of the transferrer, it was competent for the county after their maturity to show any equities attaching to them, but not to show by parol evidence that they were not to be negotiated or not sued until a certain event, for this would be to contradict the written contract by mere parol. Daniel I, p. 580, citing McSherry & Brooks, 46 Md., 118.

The fact that the bonds from which the coupons sued on have been detached have been paid and surrendered does not affect the right of recovery upon them. They thereby lose their character as incidents of the bond, but are still independent and self-sustaining instruments.

2 Daniel, 69.

It will always be presumed in favor of a holder of coupons, as of other negotiable instruments, that he acquired them *bona fide* before maturity and for value, without notice of any defects.

2 Daniel, 466.

The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports *prima facie* that he acquired it *bona fide* for full value in the usual course of business, before maturity and without notice of any circumstances impeaching its validity, and that he is the owner

thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where, indeed, such proof is necessary) *prima facie* established his case, and he may there rest it.

Second, countervailing proof that the instrument was executed without consideration as between the original parties, as for instance where it was executed for accommodation, as between them, or that the consideration, originally valid, has subsequently failed, does not impair the holder's superiority of position, and he may still rest his case upon the instrument itself, from which it will still be presumed that he acquired it in a manner entitling him to stand upon the vantage ground of a *bona fide* holder for value.

Pendleton Co. v. Amy, 13 Wallace, 305:

The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against the purchaser of the bonds for value that, though the legislature empowered it to make them and put them upon the market upon certain conditions, they were issued in disregard of the conditions?

We think they cannot.

And this is precisely the case of this plaintiff.

Collins v. Gilbert, 94 U. S. (IV Otto) 753:

A negotiable instrument payable to bearer or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date, in the usual course of business, without notice of anything to impeach his title.

The title of a *bona fide* holder for value of an accepted draft, indorsed in blank, is not affected by the fact that the

party from whom he received it before its maturity had possession of it for certain purposes, and misappropriated it.

County of Henry v. Nicolay, 95 U. S., 625, *626:*

Its agents, that is the agents of the branch roads, had them for sale, and he had a right to presume that they were lawfully entitled to them.

The coupons in question, have all the attributes of commercial papers.

The construction company which transferred them acquired them before maturity, unaffected so far as appears by any infirmity in them; and so the plaintiff acquired as good a title as it held, although over-due and dishonored at the time of the transfer.

Chitty on Bills, 13 Am. Ed., 250:

There is no plea of any knowledge whatsoever, on the part of the purchaser, of any defence to the paper, but merely that the paper was over due and dishonored.

In fact, it is very difficult to ascertain, from an examination of the answer, what the defence of the defendants is.

It is true the court finds the condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County, concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit, to which it may be said the court found upon the most immaterial matter and without any plea in the answer to support such a finding; there was no plea of any such matter, or of any such matter of defence.

It might have been warranted if the defendant had alleged that *facts* and *circumstances* of a controversy between the bondholders and Clark County concerning the alleged fraudulent issue of the bonds and coupons were known to the plaintiff when he bought the coupons in suit; what such an allegation would have amounted to is quite another and different question.

When the bonds and coupons went into the possession of the Western Construction Company they passed out of the possession of the county. They were delivered by its agent, and rightfully and lawfully delivered. From that time forth they ceased to be the property of the county. They were made, issued and delivered.

Estimate of the engineers for $66,000 and $136,249.11 were made for work done and in Clark County. (Record, p. 66.) The pretence now is that the county got them back and is not liable for their payment.

The county refuses to pay or to compromise, has or had a suit pending against the financial agent on his bond, and which agent finds it now convenient to swear that he received them back as agent of the county. The agent gets them and delivers them to Roseberry, who sells them, paying the agent one-half of the proceeds of sale. The plaintiff buys them, and it is not pretended that he or his agent, Coquard, knew how or under what circumstances Roseberry got them, from whom he got them, what he gave for them, or anything concerning these matters.

Our contention is that Clark County delivered these coupons, they were delivered to the construction company, they became the property of the construction company—the coupons—some of them were detached by the construction company, others were detached before they went into the possession and ownership of the construction company. They were perfected instruments, in any event, and passed to the plaintiff, who is a *bona fide* holder and for value, even though they were overdue. Being overdue, they are subject to equities arising out of the transaction.

Mr. Lawrence testifies (p. 58 of Record):

Question: Who, if anyone, drew the Clark County, Missouri and Mississippi Railroad bonds and coupons out of the Exchange Bank or out of your possession?

Answer: They went to the construction company.

Question: By whose order?

Answer: In accordance with the contract with the railroad company.

So the bonds and coupons were delivered. What are the equities to which the bonds and coupons are subject in the hands of a *bona fide* holder, but after due.

It is competent against the transferee, after maturity, to show any equities attaching to the paper itself, but not to show by parol evidence that it was not to be negotiated or sued on until a certain event, for this would be to contradict the written contract by mere parol. (1 Daniel, p. 580.)

FISHER & ROWELL,
H. A. CLOVER,
Attorneys for Plaintiffs.

Clinton Rowell

119-522

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1886.

L. C. WHITFORD,
Plaintiff in Error.
vs.
THE COUNTY OF CLARK.
STATE OF MISSOURI.
Defendant in Error.
} No. 82.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

CLINTON ROWELL,
H. A. CLOVER, and
JOHN B. HENDERSON,
Attorneys for Plaintiff in Error.

Pierce Bros., Brief Printers, 519 Pine street, St. Louis.

stock in the railway company, and other formal allegations. There was then set out a count upon each coupon alleging the ownership of the same by plaintiff and the amount and terms thereof. Each count set forth in substance that by said coupon the county promised to pay the bearer at a specified date a certain sum for interest on a bond of a specified number. These several counts were upon coupons coming due December 1, 1871, June 1, 1872, December 1, 1872, and January 1, 1873, the total amounting to the sum of $20,000.

The answer was as follows:

"And now comes defendant, and for answer to plaintiff's petition for defence to the causes of action, and each of them therein set forth, denies that it is indebted to said plaintiff in any sum for interest or any of the bonds mentioned in the plaintiff's petition, and states that plaintiff never owned said bonds, or any of them, mentioned in said petition, now or at any time, and states that the coupons set forth and sued on in plaintiff's petition are not, nor is neither of them, the act and deed of Clark county, and that said Clark county never delivered said coupons, or any of them, to plaintiff, or to any person, as its act and deed.

And for a further defense the said defendant says that no consideration was ever received by said Clark county from plaintiffs or any other person on account of said coupons, or any of them, and said plaintiff is not a holder of said coupons, or either of them, for value nor has at any time any person been a holder of said coupons, or either of them, for value.

And for a further defense said defendant says that, on the day of the date when said coupons, and each of them, passed out of the possession of said Clark county, the same was the property of Clark county, and ever since has been, and avers that at the time when said coupons, and each of them, passed out of the possession of said Clark county the same immediately came into the possession of plaintiff, from

the agent of Clark county, and at the time the same and each of said coupons came into the possession of said plaintiff, and for a long time prior thereto, said coupons and each of them, had been long overdue and dishonored.

Defendant denies that said defendant is indebted to said plaintiff on any account whatsoever, or that plaintiff is entitled to any judgment."

The reply was a general denial.

The case was tried by the court, a jury being waived by stipulation duly filed.

There was a special finding of facts under the act of 1865.

The evidence is also preserved in a bill of exceptions in which are saved exception to the admission of certain testimony as to equities claimed to have existed between the county and the original payee of the bonds, or of that character. (28).

There are also exceptions saved therein to the reading of certain depositions by plaintiff, the witness being at the time present at the hearing of the case. (Printed Record, pages 13 and 22).

The bonds were issued by Clark County in aid of The Missouri & Mississippi Railway Company, under a provision of its charter, which authorized the counties to subscribe, but limited the tax to be levied for the payment of the same, to one-twentieth of one per cent. on the assessed valuation.

Serious litigation has been going on for fifteen years, between the holders of this issue of bonds and the counties, and has been much before this court, but upon the question of the further payment of the bonds, after the levy authorized by the charter. None of the counties have ever seriously contested the validity of the bonds.

This case involves none of these questions, but the county here contends that the plaintiff is not entitled to a judgment upon the coupons held by him, and the court below found in favor of defendant.

On the trial, the plaintiff introduced the coupons sued

upon, which were in the ordinary form and payable to bearer.

The defendant admitted the form of the bond and coupons which were set out in the petition. (10) The bonds were in the ordinary form under the seal of the county; reciting that they were issued under an order of the County Court of Clark County, and under the authority given by the charter of the M. & M. Railroad. They were dated June 1st, 1871, and payable to the said company or bearer, and became due in twenty years from date, and promised to pay interest at the rate of eight per cent. per annum, payable semi-annually on the first day of June and December on the presentation and surrender of the coupons annexed.

The plaintiff further introduced the act to incorporate the M. & M. R. Co. Sec. 13 of which provides for the subscription and issue of bonds (13), and rested the case.

The defendant then offered the deposition of A. S. Tinsman, who had been the financial agent of the county and railroad company, in reference to the delivery of the bonds.

The plaintiff objected to the reading of this deposition, because the witness was present in court. This fact was admitted (13), and also that the witness resided more than one hundred miles from the place of trial. The court overruled the objection and plaintiff excepted.

It is proper to state that this and the other depositions of defendant were taken under the act of Congress with notice, and plaintiff was intending to be present, but at the actual time of the taking the country was inundated by water, and it was impossible for him to reach there by any means of travel, and accordingly the evidence was taken without cross-examination and in the absence of plaintiff. To overcome this difficulty, the plaintiff subpœnaed and brought these witnesses by process to the place of trial and the material ones were present.

This same objection and exception appears to the testimony of N. T. Cherry at page 22 of the printed record. After the deposition of Tinsman had been read, plaintiff

later in the trial called him as a witness (66), but did not so call the witness Cherry.

The deposition of Tinsman tended to show that the coupons in suit were left with Bartholow, Lewis & Company, bankers in St. Louis, with the bonds, in 1873; that he next deposited them with Exchange Bank in Pana, Illinois; that the bank failed, and they remained with G. P. Lawrence, the president; that Lawrence delivered them to him in 1878, and he delivered them to R. H. Roseberry in 1881, who was one of the securities upon his bond as financial agent of Clark county; that he received no consideration from Roseberry.

He defined the capacity in which he received back the coupons as that of financial agent of Clark County, but gave no details.

The defendant then offered in evidence the deposition of S. F. Hacket, in which he produced the records of the County Court of Clark County, showing the terms and conditions of the original subscription to the stock in the railway company, the appointment of said A. S. Tinsman as financial agent, and R. S. Washburn to vote the stock in the corporation. The terms were that the county subscribed for the stock and was to pay for it in bonds of the county; that the bonds were to be delivered to a financial agent and sold by him or delivered as the work progressed in the county; that said company should deliver a certificate for two thousand shares of paid up stock in the company as soon as bonds were delivered to the financial agent. He also produced the order requiring the bond from the financial agent to the county and railroad company, and the bond itself (20, 21 and 22).

The defendant next offered the deposition of N. T. Cherry (22), taken as that of Tinsman, and to its use, as before stated; the plaintiff made the same objection as before and exception. This witness testified to the purchase of the coupons in suit for the agent of plaintiff; the amount paid for the same, and to his personal knowledge of the ob-

jections to the subscription to the railway company, and the "general facts and circumstances" of the controversy between Clark county and its bondholders, and the knowledge of plaintiff's agents of these alleged facts.

It is from the evidence of this witness that the court finds, if it does so find, knowledge of the condition of the coupons and general facts and circumstances, as stated in the finding.

The defendant next offered the depositions of Bartlett, Jordan, McCoy, Stafford and Turner, who gave evidence tending to show that the railway company did not do all the work required, under the subscription, and meetings and objections to the subscription in Clark county.

It is from the evidence of these witnesses that the court finds—if it does so find—the non-compliance with the condition of the subscription by not doing all the work required.

To this evidence, at page 28 of the record, plaintiff made full and formal objections and saved proper exceptions.

Defendant offered the deposition of said Reese H. Roseberry, who gave evidence tending to show that he received the coupons in suit from the wife of Tinsman in 1881 with Tinsman's consent, and that they had been previously deposited with her by an arrangement with Tinsman; that he obtained them in pursuance of an agreement between himself and the attorney of the construction company that built the road, for an indebtedness of that company to him of several thousand dollars, which had never been paid, and that at the time he sold the coupons to plaintiffs' agent he told him that he received them for his debt and with the consent of the railroad company.

The plaintiff then offered the deposition of Grove P. Lawrence, the president and owner of the Bank of Pana and of the construction company. He testified that he received all the bonds and coupons from Bartholow, Lewis & Co., with the consent of the agent, Tinsman, in 1873 or 1874, giving him a bond of indemnity and took them to his bank at Pana, Ill.; that the construction company assumed a lien on

the bonds to Bartholow, Lewis & Co., which they afterwards paid in part, and the balance was put in judgment; that the construction company sold the bonds which they obtained upon certificates of the engineer for work done, and the coupons in suit were left with him; that Tinsman, in 1878, came and asked for them and he gave them to him, as he supposed them of no value, but he would not have done so if he had deemed them worth anything; that the construction company had failed and also the railway company.

The plaintiff called Blair as witness, who testified from the records of the company as to the amount of work done under the certificates of the engineer, amounting to $200,000.

Plaintiff then called said Tinsman as a witness, who admitted, when the draft was exhibited to him, that he received from Roseberry one-half of the money received from plaintiff for the coupons, but put the blame on his wife; that he delivered the coupons to Roseberry and that the county had sued him upon his bond. He also admitted that the railway company owed him for his services, but said he could not substantiate it; that he delivered the bonds to Bartholow, Lewis & Company at the date of the bonds in 1871.

The court then found for defendant, and a motion for a new trial was filed, which was overruled (72) and exceptions saved.

The court made at the trial a special finding of facts as follows:

L. C. Whiteford *vs.* Clarke County.

"The court sitting without the intervention of a jury in the trial of this cause finds the facts to be:

That the said county subscribed, in the year 1871, for 2,000 shares of the capital stock of the Missouri and Mississippi Railroad Company, to be paid in the bonds of said county at par, running for the term of 20 years, and bearing interest at the rate of eight per cent per annum; said bonds

or the proceeds thereof to be used in the construction by said company of that part of the railroad lying within said county. The county was, under said contract of subscription, to deliver its bonds forthwith to a financial agent to be chosen by its county court, who was to give his bond as agent, subject to the approval of the company and of the court, for the use of the county and of the company, conditioned for the faithful performance of his duties as such agent, he to have power to sell the bonds through the St. Louis bond and stock board, or through Bartholow, Lewis & Co., bankers of St. Louis, and to pay over to the railroad company the said bonds, or the proceeds of the sale thereof, on the order of said railroad company, as fast as the work progressed on the railroad in said county, each payment to include all work and necessary expenses expended in said county to the date of said payment.

The bonds, with interest coupons annexed, were accordingly delivered to one Tinsman, who had been duly appointed such financial agent, and given his official bond, conditioned and approved as required. The county also appointed an agent to vote its stock and received a certificate therefor. Said financial agent deposited the bonds and coupons with Bartholow, Lewis & Co.

The railroad company entered into a contract with a construction company, in 1872, to build the road and to receive in part payment therefor the bonds of Clark county. At the instance of said construction company the county bonds and coupons, then in possession of Bartholow, Lewis & Co., were removed to and deposited with the Exchange Bank at Pana, Ill., in 1873, said construction company, with sureties, indemnifying said Tinsman, the financial agent, for said removal, and making provision also for a lien said Bartholow, Lewis & Co. had on said bonds and coupons to the amount of about $30,000. There were deposited with said Exchange Bank, in 1873, to the credit of said Tinsman, agent, Clark county bonds to the amount of $190,000, and detached coupons to the amount of $24,000.

The construction company obtained and used the bonds, but never did all the work required, nor did the railroad company; the construction company and the Exchange Bank failed. The coupons in suit continued in the possession of the former president of said bank after its failure until the year 1878, when he delivered them to said Tinsman, the said financial agent. Said Tinsman retained possession of them until 1881, when he delivered them, without consideration, to his brother-in-law, Roseberry, who was one of the sureties on his (Tinsman's) official bond. At that time Clark county was negotiating with its bondholders for a compromise on its bonds and coupons issued for its subscription to said railroad stock, as heretofore stated. The coupons in suit had been, for many years, detached from the bonds and treated as a distinct and matured obligation. The plaintiff, through his agents, negotiated for and bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, sister of Roseberry, received from Roseberry $1,150.

The condition of said coupons and the general facts and circumstances of the controversy between the bondholders and Clark county concerning the alleged fraudulent issue of the bonds and coupons were known to the plaintiff when he bought the coupons in suit."

The defendant then introduced the bond of indemnity of the construction company to Tinsman.

ASSIGNMENT OF ERRORS.

The plaintiff assigns for error:

I.

That under the special finding of facts by the court all the issues raised by the pleadings were found in favor of the plaintiff, and the judgment should have been in his favor.

II.

That under the special finding of the facts and issues made, the judgment should have been for the plaintiff.

III.

That the facts found by the court are not sufficient to sustain the judgment of the court.

IV.

That it appears from the special finding of facts that the court found for the defendant upon an issue not raised by the pleadings.

V.

The court erred in finding that the coupons sued upon were past due and dishonored.

VI.

The court erred in allowing plaintiff to read the deposition of Cherry, Tinsman and other witnesses, when they were present and in attendance as witnesses on the trial of the case.

VII.

The court erred in admitting the evidence of Bartlett and other witnesses tending to show equities between the original

parties to the obligations sued upon, or a failure to comply with a condition in reference thereto.

VIII.

The plaintiff assigns for error that the court did not find facts upon the evidence which were material for a determination of the cause so as to conclude that the plaintiff was not entitled to recover and that the defendant was not entitled to judgment.

IX.

The plaintiff assigns for error that the court rendered judgment for defendant when it should have rendered judgment for plaintiff.

BRIEF OF THE ARGUMENT.

I.

We contend that the coupons sued upon in this case were not past due and dishonored commercial paper under the law merchant. It is plain that the court below found against the plaintiff on the ground that their coupons were past due and dishonored paper. If it had not been for this view the evidence as to these alleged equities, which were admitted against the objection and exception of plaintiff (28), would have been excluded, and the court would have found for plaintiff, notwithstanding the existence of the facts found by it in the special finding. The only possible defense which the court could have acted upon was that the coupons were delivered in violation of a condition that the financial agent should not deliver them unless certain work was done in the county. This certainly would not have been a defense as against the holder of unmatured coupons, unless he had knowledge of it, and then not if he purchased from a party who was an innocent holder. There is no finding of a fact that plaintiff had knowledge of the alleged violation of this condition and no proof of it. These coupons were not past due paper. The bonds had not matured and will not do so until 1891, as they ran twenty years from June, 1871. This fact was admitted (10) and was found as a fact by the court (73). We insist that the coupons of a bond not yet matured are not past due and dishonored paper although the time for their payment has passed. We conceive that this is what this court has fairly decided. In the following cases this court has decided the coupons are negotiable within the meaning of the law merchant, although detached and past due:

Thompson v. Ice Co., 70 U. S., 177.
Aurora v. West, 74 U. S., 82.
Clark v. Iowa City, 87 U. S., 583.
Walnut v. Wade, 103 U. S., 683.

In the case of Cromwell v. The County of Sac, 96 U. S., 58, the question was raised as to whether the presence of past due coupons upon a bond was sufficient to make the bonds dishonored, or whether such past due paper was sufficient notice of a defense to the bonds to make them dishonored paper under the law merchant. This court decided that it was not, and its argument is in favor of the proposition we now insist upon, and was so subsequently determined by this court in the case which we claim decisively decided this point.

In this case the court declares, "The interest stipulated was "the mere incident of the bond. The holder of the bond had "his option to insist upon its payment when due, or allow it "to run until the maturity of the bond; that is, until the prin- "cipal was payable. Many causes may have existed for a "failure to meet the interest as it matured entirely independ- "ent of the question of the validity of the bonds in their "inception."

The court was, in that case, careful to limit its decision to the precise question before it; but its reasoning was that a failure to pay the instalments of interest was no notice of invalidity or illegality in its inception, but could be easily accounted for on other grounds, such as "temporary financial pressure, the falling off of expected revenues, and many causes having no connection with the original validity of such instruments."

We insist that the case of the Town of Thompson v. Perrine, 106 U. S., 589, fairly decides the question involved here.

Perrine had brought suit upon coupons of bonds issued by the town of Thompson, and the case had been decided by this court in Thompson v. Perrine, 103 U. S. 806. In that case the coupons were not overdue when purchased by Perrine and this court decided that a curative act of the State of New York making the bonds good, notwithstanding they were not issued in compliance with the law, was within the legislative power, declining to follow the Court of

Appeals of New York which had decided adversely to the curative act. This court had stated in that opinion that Perrine had purchased the coupons in that suit before the decision of the Court of Appeals. Supposing they would stand in a better position on coupons which Perrine had purchased after the New York decision and that were past due when he purchased them, the town brought such a suit here, which is the case now referred to, and upon which we rely. Upon that point this court held that the fact that Perrine purchased the coupons after due and after the decision in New York made no difference, because the curative statute was within the power of the legislature, and the bonds were good by whomsoever held. This part of the decision is pursuasive in our favor, but this court went further and held distinctly that these coupons were, like *promissory notes, negotiable under the law merchant*, although past due, because the bonds from which they were taken were not past due. The point was made in that case that the Federal courts had not jurisdiction because the coupons when sold were past due and dishonored paper, and did not come within the exception of the act of March 3, 1875, which excludes jurisdiction on a *contract* in the hands of an assignee when the assignor could not sue, but gives an exception as follows: "Except the cases of promissory notes negotiable by the law merchant and bills of exchange."

This court emphatically says on this point:

"But the contention of counsel is that the coupons in suit "being detached from the bonds and over-due when Perrine "purchased them, were dishonored, and therefore not negotiable by the law merchant, but are embraced by the general inhibition on suits founded on contracts where the "assignor himself could not have sued in the Circuit Court."

"This position can not be sustained. It is an immaterial "circumstance that the coupons when purchased by Perrine "were detached from the Bonds. And *the bonds not having then matured*, the coupons, though over-due, had not lost "the quality of negotiability by the law merchant. This

" result must follow from the principles announced in Crom-
" well v. County of Sac, 96 U. S., 51."

The language is plain and needs no interpretation. These coupons, though overdue, had not lost the quality of negotiability by the law merchant. The quality of negotiability by the law merchant is not simply the method of transfer, whether from hand to hand or by written assignment, but it is its position in the hands of the assignee. Does he hold it unaffected by previous infirmities? Is it in his hands disgraced paper? If it is, then it has lost the quality of negotiability by the law merchant, otherwise it retains it. Such language by a lawyer, and to a lawyer, can have but one meaning.

But the reason given for the retention of this quality of negotiability is emphatic as to the meaning of the court. It is because the bonds have not yet matured. Why is this a reason for the retention of the negotiability unless it is a full negotiability like the bond itself? The argument is that the bond controls the coupon; that the interest is the mere incident to the bond, and that the party can hold it until the maturity of the bond if he chooses. But why give any reason if all that is decided is that the coupon is merely transferable, or sufficiently negotiable to come within the exception and not fully negotiable and impregnable paper? If paper, after-due, has this quality independent of full negotiability, the coupon would have it independent of any effect the bond has upon it. The court, by the reason given, decides that it would not have this quality except for the reason, and the reason must have its full effect, that it, the coupon, remains fully negotiable until the bond itself, which makes it negotible, is dishonored.

Again it says, that this follows from the principles announced in Cromwell v. Sac County, *supra*. The principles there announced were, that the coupon past due did not dishonor the bond; that it was no notice of any infirmity in the original transaction; that the coupon was merely an incident to the bond; that the holder of the bond had his option to

insist upon its payment when due, or allow it to run until the maturity of the bond, etc., and it easily follows that the coupon itself is not dishonored until the bond is dishonored. The conclusion which follows from the reasoning of the case of Cromwell v. Sac County is, that the coupon is negotiable like the bond itself, and the bond makes it so, until its maturity.

This court by this decision holds this paper, although past due, as still "negotiable by the law merchant," and because the bond to which it was an incident has not matured. If it had been past due and dishonored when it was transferred to Perrine, all the defenses would have been available, and it would have been no more than a contract between the two parties, and the assignee could not sue. Only paper negotiable under the law merchant is to be sued in the Circuit Court, and this is still negotiable under the law merchant. While the court does not decide the question in such a case as the one at bar, it decides it upon the broadest ground—that of jurisdiction.

The question has not yet been decided by this court, but we believe that it must hold that a purchaser of commercial paper, which has become past due and dishonored, can not sue in the Circuit Court, unless his assignor could have sued.

If the equities between the original parties to these coupons be excluded, and plaintiff did not receive dishonored paper by his purchase of the coupons sued upon, the rulings of the court below were wrong. All the evidence offered by defendant should have been excluded, and on the facts found there should be judgment for the plaintiff.

We objected to this evidence on the ground that it was incompetent (28), and it was admitted over our objection. We continued the objection to all the testimony, and it is all of the same nature and to the effect that the original parties were not entitled to the bonds, because they had not fully complied with a condition attached to a subscription, or that the agent of the county had no right to deliver the coupons sued upon for that reason. Such defences are not good as

against a bona fide purchaser for value before the dishonor of the paper.

The court found that the bonds had not matured at the time of the suit, and it further found that the plaintiff negotiated for and purchased the coupons for value.

If the paper was not dishonored the plaintiff is then entitled to recover, unless the court found that he had knowledge of some fact sufficient in law to defeat his recovery. Mere suspicion is not enough, nor sufficient facts to put the party on inquiry is not enough, in the absence of bad faith on the part of the purchaser.

The decisions of this court have fully settled the law as to the effect of a finding of facts in a case tried by a court, a jury being waived.

Prior to the act of 1865, this court held that parties who waived a jury had practically submitted the case to arbitration, and there was no way to review the law or the facts in this court. This act was passed to avoid that difficulty.

Its language is:

"The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as a verdict of a jury. The rulings of the court in the cause, in the progress of the trial, may be reviewed in the Supreme Court of the United States, upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special the review may also extend to the determination of the sufficiency of the facts found to sustain the judgment."

Following that act, the court decided that questions of the rulings at the trial could be preserved by a bill of exceptions, and upon a special finding of facts in the nature of a special verdic, the question would be reviewed as to whether the facts justified the judgment.

"In the case of a special verdict, the question is presented "as it would be if tried by a jury, whether the facts thus "found require a judgment for plaintiff or defendant."

Morris v Jackson, 76 U. S., 125.
Flanders v. Tweed, *id.*, 425.
Kearney v. Case, 79 U. S., 275.
Miller v. Life Ins. Co. *id.*, 285.
Ins. Co. v. Sea, 88 U. S., 158.

In these cases the court determined what should be the nature of the special finding.

"It is not a mere report of the evidence, but a statement "of the ultimate facts, on which the law of the case must "determine the rights of the parties. A finding of the propositions of fact which the evidence establishes, and not the "evidence on which those ultimate facts are supposed to "rest."

Morris v. Jackson, *supra*.

The court has found the ultimate facts, the propositions of fact which entitles the plaintiff to recover. It has found that plaintiff was the holder, for value, of paper not dishonored, and he is presumed to be such without such facts being found.

Has it found any fact which overcomes this position of a bona fide holder?

It must be the finding of knowledge of some proposition of fact which would overcome the presumption in his favor.

What the court finds is as follows:

"The condition of said coupons, and the general facts and "circumstances of the controversy between the bondholders "and Clark County, concerning the alleged fraudulent issue "of the bonds and coupons were known to the plaintiff when "he bought the coupons in suit.

It is plain that no proposition of fact, ultimate fact, or evidence of the ultimate fact appears in this part of the special finding. It merely refers this court to the evidence as to something which had appeared or claimed to have been disclosed therein. The condition of said coupons is not described or determined, or what, in their condition, the plaintiff knew. It is probable the court meant that condition

of their being detached and matured obligations, but we submit this is no finding of any ultimate fact by which the court can determine that plaintiff knew any particular fact which would defeat his right of recovery, or destroy his position of a bona fide holder. The court finds that he knew the general facts and circumstances of an *alleged* fraudulent issue of the bond and coupons. This is not a finding of any fact which would affect the plaintiff. He knew the facts of an *alleged* fraudulent issue, which is a finding that there was no actual fraudulent issue, but only allegations of fraud. The mere knowledge of charges of fraud, or of such facts as the court would not pronounce fraudulent, but would only describe them as being so alleged, is the knowledge of no ultimate fact which would overcome the presumption. The court should have found that he knew that the bonds were fraudulently issued or knew of the particular facts which constituted the fraud in the issue in order to defeat us.

We submit that the court, having found facts which warrant a judgment for plaintiff as a bona fide holder for value, the judgment should be for plaintiff in the absence of facts found which overcome the presumption, and this is what this court did in the cases of Rechter v. Wood, 109 U. S., 185, and Fort Scott v. Hickman, 112 U. S., 150. The same standard should be applied to this part of the finding as to the other. There should be a finding of knowledge as an ultimate fact such as makes him not a bona fide holder. A knowledge of undefined facts of an uncertain quantity of alleged disputes and matters which might or might not amount to a fraud is not such a special finding. It finds nothing definite and cannot affect the judgment.

No part of the answer sets up any such defense and this finding of the court does not reach the standard required by the decisions of this court, whether it be regarded in the nature of a special verdict, an agreed statement of facts, or the special finding, is *sui generis*. The only allegation in the answer which can be considered as touching this question is that the plaintiff was not a holder for value. To raise this

question the allegation should have been that when the plaintiff purchased the property he had knowledge that they were fraudulently issued, or that they were fraudulently or illegally issued, so that under the decisions of this court, it would throw upon the holder the burden of showing that he paid value for them.

This finding must, however, be held to the same standard as a special verdict.

In Supervisors v. Kennicott, 103 U. S. 556, construing the act of 1865, this court says:

"It is manifest that the act of 1865, was not intended to "interfere with this practice. The evident object of that legislation was to give special findings the *same effect* for the purposes of a writ of error as a special verdict, or an agreed case."

See also,

Norris v. Taylor, *supra*.
Smith v. Sac County, 78 U. S. 139.
Ins. Co. v. Fulsom, 85 U. S. 249.
Tyng v. Grennell, 92 U. S. 467.
Fort Scott v. Hickman, 112 U. S. 164.

Treating this part of the finding as a special verdict, or even as an agreed statement of facts, it cannot stand the test of the cases for a moment.

In Barnes v. Williams, 11 Wheaton, 415, this court says: "When in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause."

To the same effect are:

Prentiss v. Zane, 8 How. 70.
Suydam v. Williamson, 20 How. 432.
Collins v. Riley, 104 U. S. 322.
Supervisors v. Kennicott, 103 U. S. 556.
Tidd's Practice, 4th American Ed. 2 vol. p. 489, and cases cited in note.

It has been also decided by this court that this is not a sufficient finding of fact, when the question was directly raised on a special finding of fact under the act of 1865.

The findings, "if special, must not be a mere report of the evidence, leaving the conclusions of fact to be adjudged by the appellate tribunal, as that course is forbidden by the repeated decisions of this court."

Tyng v. Grennell, *supra*.

In Retzer v. Wood, 109 U. S. 185, the plea was the general issue, but under the evidence, the court found against the plaintiff, on the statute of limitations and under a special finding of fact to this effect, and this court reversed the case, rendered judgment in this court for this error below, and refused to remand the case for the issue to be perfected.

The case of Supervisors v. Endicott, *supra*, was upon an agreed statement of facts, which the cases here cited hold is to be treated as a special finding; this court reversed the case, holding that the statement showed no damages were sustained. The suit was upon an appeal bond, and part of the damages were for the alleged depreciation of the property. This court made a similar objection on that point to the one we now make: "There is no statement that the bonds had depreciated in value or that taxes had accumulated; neither is it stated that any loss had actually accrued to appellees by reason of the stay of sale." This point was made against the agreed statement of facts.

In Fort Scott v. Hickman, *supra*, the defense was the statute of limitations, which was met by plaintiff with a claim of waiver by a written acknowledgment of the claim after the statute had run. This court concludes from the fact that the court did not, in its special finding, disclose the fact that the circular, which was claimed to be the waiver, personally reached the plaintiff, or was sent to him; that such was not the fact, and that such failure of finding warranted a judgment in this court for defendant, when the judgment below had been for plaintiff. The opinion even argues it from the evidence itself.

In Smith v. Sac County, *supra*, the court had found that the plaintiff was the holder and owner of the coupons declared upon in the petition, and became the holder by *transfer* to him before maturity. Because the court found no more than this, this court construed the finding of fact to be to the effect that the plaintiff had not shown that he was a holder for value.

According to the test of these decisions, it seems plain that this finding does not put the plaintiff in any of the positions which defeat a holder of unmatured commercial paper, as fixed by the law laid down by this court.

In the case of Murray v. Lardner, 69 U. S., 110, the question of what knowledge would defeat a purchaser for value of unmatured paper was most carefully considered and the question finally settled. It there says "that suspicion as to "defect of title or the knowledge of circumstances, which "would excite such suspicion in the mind of a prudent man, "or gross negligence on the part of the taker at the time of "the transfer, will not defeat his title. That result can be "produced only by bad faith on his part."

If the party be acting in bad faith in the purchase, show guilty knowledge or willful ignorance, then on such an issue, properly raised, he can be defeated. We submit that the court finds nothing as against the plaintiff approaching a dishonest intention in purchasing these coupons and paying a large sum of money for them. The defendant contented itself with a plea simply alleging that the plaintiff was not a purchaser for value. The plea should have been that his purchase was in bad faith, with a guilty knowledge and purpose in obtaining them, amounting to fraud and corruption on his part, and the court could not have meant this by its finding, for it was not pleaded or claimed. The "condition" of the coupons could not have been such as to charge the plaintiff with bad faith in their purchase. The "general facts and circumstances of the controversy between Clark County and its bondholders concerning the *alleged* fraudulent issue of the bonds," if known by plaintiff, could not

be a guilty knowledge or show bad faith on his part. Nothing in the evidence or finding approaches such an act on the part of anybody connected with the history of the bonds. There was not enough to excite his suspicion, even if this were sufficient. Clark county had never defended a single case against the bondholders. The contest had always been over the further levy than one-twentieth of one per cent. to pay the interest. It never denied the validity of the bonds. We insist that if the plaintiff was the holder of commercial paper before its dishonor, as he was found to be a holder for value, nothing short of a finding that the plaintiff acted in bad faith in the purchase, or of such facts as would show it, under an issue fairly raising the question, should sustain a judgment against him.

This argument is equally effective as against the principle that the defendant had shown a sufficient fraud or illegality in the original issue of the bonds to throw the burden upon the plaintiff to show that he paid value for them, as held by this court in Smith v. Sac County, *supra*, and other cases. In that case the petition alleged that the plaintiff was the owner and holder of the coupons for value, and that he received them in *good faith* before maturity, and *paid value* therefor; and this court in that case decides that this was put in issue by the general denial in the answer, thus showing the necessity of an issue being made upon that question if it were to be raised at all. Not for any purpose of evading the issue, but as the correct method of pleading, the plaintiff in the case now before the court had simply asserted his ownership of the coupons in suit. The defendant did not even make a general denial of this; but asserted that it had not become indebted by the coupons for independent reasons. The answer asserts simply that plaintiff was not a holder for value, and this single issue, made in reference thereto, the court found in our favor. To hold that this answer was informing the plaintiff that the defendant was putting in issue the good faith of plaintiff's ownership of the coupons, or that there was such fraud or illegality in the issue of the bonds as

would shift the burden upon him to show, not only that he paid value, but that he was acting in bad faith in the purchase, or willful ignorance of facts, is to ignore the need of pleadings. No fair intendment in favor of the answer can make out an intention to put such an issue before the court.

Nor does the finding of the court in any way show that such a theory was in the mind of the learned judge in deciding the case. He finds that the bonds were properly issued and delivered, and the county received its consideration therefor in the stock of the corporation. The illegal delivery, if it may be so considered, or the delivery before the reserved condition of the subscription was entirely fulfilled, was long years after the first complete delivery, and obtained by an improper re-possession of the coupons, if this can be construed from the evidence or finding of facts. It can not be contended that this is such a showing as would shift the burden upon plaintiff according to the standard of the cases.

The court meets it if raised and forced upon us by finding that we negotiated for and purchased the coupons for value. There was no intimation that plaintiff did not pay the full market value of the property. That court and this also is too familiar with the inherent defects of this issue of bonds to find, if the question were raised, that any price would not be a fair price for bonds which, although valid as instruments, were without a statutory remedy for furnishing means of payment of interest or principal.

It seems to us that, under the finding of facts upon the issues made, considering these coupons as negotiable paper, because the bonds had not matured, there must be a judgment here for plaintiff in error or a reversal with instructions to the court below for such a judgment.

II.

If the plaintiff's coupons were past due and dishonored, then the court by its special finding found every defense pleaded in favor of plaintiff, and the judgment should have been for plaintiff.

The possession of an instrument payable to bearer entitles the holder to judgment, unless some defense is made out, and this is shown before the answer of defendant is to be considered.

Story on Bills § 425.
Uther v. Rich., 10 Adolphus and Ellis, 784.
Bailey v. Bidwell, 13 M. and W. 73.
Raphael v. Bank of E., 33 E. L. and E., 276.
Stephens v. Foster, 6 C. and P. 189.

And this is especially true of coupons of this character.

Aurora City v. West, 7 Wall. 82.
Thomson v. Lee County, 3 Wall. 327.
Clark v. Iowa City, 20 Wall. 583.
Walnut v. Wade, 103 U. S. 696.

The first defense of the answer is that plaintiff never owned the bonds from which the coupons were taken. This constitutes no defense, and has been too often decided to need authorities to support it.

The second defense is that the coupons were not the act and deed of Clark county, but the court finds that the bonds and coupons were made and executed by Clark county, and constitute its act and deed as much as any obligation can do so.

The third defense is that they were never delivered as the act and deed of the county. These were instruments payable to bearer that pass by delivery. No different method of delivery is necessary, because they were past due. They still pass by delivery. The court finds that they were first

in the hands of an agent of the county, and that he had delivered them to the Exchange Bank of Pana, Ill., and had received indemnity for so doing, and that the parties so receiving them had paid a lien upon them which this agent had suffered to be created; that this same agent had again received the coupons, but does not find that he received them for the county or delivered them to the county, which is the ultimate fact necessary to affect their position.

The court further finds that he transferred them to one Roseberry, but without consideration. It is still a transfer, and the title passed at least to the extent of a complete delivery. The ultimate fact found is that there was a transfer to Roseberry, not a mere deposit with him. The evidence is that it was a valid transfer and Roseberry was lawfully entitled to them. The court finds nothing to defeat his possessory title, and according to the evidence he could have maintained his title as against the county. The court then finds that plaintiff then negotiated for and purchased them for $2,500. The court does not find that this was an inadequate price, or that it was invalid or suspicious on that account, or that the plaintiff acted in any bad faith. He then received possession of the coupons and possessed them at the trial. This was a sufficient delivery as the act and deed of the county. If the agent has violated his duty the county has its remedy against him, and was prepared for it by its bond.

There was no plea of fraud in the delivery, but non-delivery; but the court finds sufficient facts to constitute a delivery in fact and in law.

As we have shown, no knowledge of these facts has been shown against the plaintiff. All the court found was as to the condition of the coupons and knowledge of the alleged fraudulent controversy concerning the bonds and coupons.

The further defense made is that plaintiff was not a holder for value. The court finds that he negotiated for and purchased the coupons for value. The amount paid is not material, although as a matter of fact he paid an adequate price.

as before stated, and more than they were worth under the effect of recent decisions of this court, were all the bonds now outstanding. The levy is limited to one-twentieth of one per cent., and this makes them almost without value, if the county is to be the sole judge of what shall be done with its other revenues.

The claim is made also that the coupons were the property of Clark county when delivered to plaintiff. The court finds that the county subscribed for two thousand shares of the capital stock of the company, and that it received the stock in payment therefor. This subscription was in May, 1871, and the delivery of the stock to the county, and the bonds to the agent Tinsman (who was the joint agent of the county and railway company), was at the same time, or shortly after, the bonds bearing date of June 1, 1871. The court finds the ultimate fact of the subscription for the stock and payment for the same with the bonds. This was all the consideration the county was to receive for the bonds, or could receive under the railway charter, which authorized the subscription. Having received the stock, and all the pay it was to ever get, it had no longer any title to the bonds or coupons. If the condition of the actual delivery of the bonds, which the county claimed the right to attach to the subscription, had not yet been complied with, or not fully complied with, this did not revest the title in the county. It could not retain the stock and the bonds also, and certainly not after an actual delivery by the agent.

The court has therefore found the facts which decide this issue in favor of plaintiff. Certainly it has not found it in favor of the defendant. It would seem to need no argument to maintain the proposition that the court could not find for defendant upon an issue not set up in the answer.

Pleadings in this case were governed by the code of Missouri, and it has there been determined in numerous cases that if the defense be based upon grounds which are not included in the allegations necessary to make out the

plaintiff's case, it must be set out in ordinary and concise language.

Northrop v. Mississippi Valley, I. C., 47, 435.
Russell v. Whitley, 59 Mo., 196.
Scott v. Robards, 67 Mo., 289.

This court has, however, fully passed upon the question as it appears here, holding that the court can not, in its finding of facts, raise an issue not pleaded.

Retzer v. Wood, 109 U. S., 185:

In this case, before referred to, the court below found for defendant on the statute of limitations, and this court reversed the case and entered judgment here, refusing even to remand the case for the purpose of making the plea. This is also the effect of the cases heretofore cited.

In this case the court below might just as well have found against the plaintiff on the statute of limitations or on a plea of payment as to find upon any other issue not raised by the pleadings.

III.

The court did not find any fact, whether raised by the pleadings or not, which was a defence to the coupons.

The defense that plaintiff is not entitled to recover because of an alleged fraudulent delivery of these coupons by the agent, Tinsman, is not sustained by the findings of the court. The issue was not presented by the pleadings, nor was it proven or found by the court in its special finding.

The court finds that these bonds and coupons were bought and paid for by the railway company. The receipt of the stock was its consideration, and the court finds it received it and appointed an agent to vote it. It finds that the agent first intrusted them to Bartholow & Company and that they obtained a lien upon them, the amount thereof not being found, but the evidence shows it to have been a large sum; that the agent then intrusted them to the Exchange Bank in Illinois and was indemnified by the Construction Company for such delivery, which paid the lien upon them. This was a parting with the possessory title. The agent's power over them had ceased and he relied upon his indemnity. He had done his work, and, if improperly, the county must hold him responsible. Afterwards, when his duties as agent had long since ceased, his mere receipt of the coupons again is not a re-delivery of the property to the county. Both the railway company and the construction company had long before that failed and ceased to exist, as the court finds, and how could this party be an agent in this transaction still? Had these coupons been seized by the creditors of the company, the county could not have asserted a title to them. They, in fact, get into the possession of a creditor of the construction company and he had a right to retain them, and by our purchase we obtained his title, which was a good one. Surely there was no fraud or illegality in this transfer. The finding of the court that there was no consideration be-

tween Tinsman and Roseberry is not a finding that Roseberry had no title as a creditor of the company. The court finds a transfer from Tinsman to Roseberry. He had the possessory title, and, being a creditor, he could hold them; or, if not, he could convey a title to such property to a purchaser for value.

The merits of Roseberry's claim and how he became entitled to those coupons are fully disclosed by the testimony which in this respect is entirely uncontradicted. Nor is there any finding of the court which controverts the same even by implication. It appears from the evidence that in 1874 when the construction company had failed and a section of the road been sold, said company was indebted to Roseberry for work and labor in the sum of about $3,000, that the said company thereupon agreed with him through its attorney that he should have the $20,000, in coupons remaining in the hands of Lawrence, one of the directors of the company and late president of the Exchange Bank at Pana, Illinois. Those coupons, as Roseberry testifies, were by agreement between himself and the company's attorney to be divided between himself and Tinsman, who also had a claim against the railroad company for services as agent. The coupons were supposed to be comparatively valueless, because the county had no revenue for the liquidation, consequently they were allowed to remain in the possession of Lawrence until 1878, when Tinsman, in pursuance of the aforesaid agreement, obtained them from Lawrence and subsequently delivered them to Roseberry in consummation of the agreement, who, upon sale of same to plaintiff, refunded $1,150 in consideration of Tinsman's claim. This latter circumstance in no wise taints the transaction with fraud or impairs Roseberry's good faith in the premises. It is perfectly reasonable that Tinsman should have had, as he professed to have, a meritorious claim for compensation. He was, as appears by the record, not simply the financial agent of the county and as such charged with a trust in the sole behalf of the county. On the contrary, as appears by the record, he

was appointed with the concurrence of the railroad company as the agent of *both* parties and executed a bond as such, conditioned for the protection of both the county and railroad company, and when the bonds were delivered to him he subscribed a receipt therefor as the "financial agent of Clark County and the Missouri & Mississippi Railroad Company." His sole duty was to disburse the bonds or the proceeds thereof upon the order of the railroad company, and this he did when by direction of the railroad company he delivered them, including coupons, to the construction company in accordance with the terms of the contract between the construction company and the railroad company.

The construction company, for its own protection, demanded this delivery in advance, agreeing to assume a discharge or lien thereon to the amount of $30,000, incurred for advances made by Bartholow, Lewis & Co., in whose custody the bonds and coupons then were. The railroad company and Tinsman assented to this, and a bond conditioned to hold Tinsman harmless by reason of such delivery was formally executed. Whereupon Tinsman delivered the bonds and coupons to the construction company. It was no qualified or conditional surrender, but an *outright delivery*. Tinsman relying upon his indemnity bond and the assurances of the president of the Exchange Bank at Pana, Illinois, that the proceeds of same should be applied to the construction of the road. Tinsman at the time received a written statement from Lawrence showing the amount of bonds and coupons thus delivered. Here his duties and authority as financial agent of the county and railroad company terminated; he was literally *functus officio*.

That the construction company thus acquired a perfect title as *bona fide* holder of these bonds and coupons cannot be controverted. The agent had authority and discretion to make the delivery and he exercised it. The construction company applied the entire proceeds of all the bonds as shown by exhibit in accordance with contract. What possible circumstances could impair the title of the construction

company or its right to recover against the county upon the remaining coupons?

The county had no contract with the Construction Company and could not plead a partial failure of consideration by reason of the R. R. Co. having failed to complete the road. Nor could the county, for the purposes of any defense, avail itself of the fact that the Construction Company acquired a portion of these coupons after maturity, for the reason that said company, by its advances in discharge of lien of Bartholow, Lewis & Co., who received them before maturity, acquired and succeeded to all the rights of Bartholow, Lewis & Co. in the premises.

The court finds as a fact that the bonds and coupons were delivered to the Construction Company, and the legal effect of such finding is equivalent to a declaration that said company acquired title and a right to recover. That Roseberry came lawfully and deservedly into the possession of these coupons cannot be denied; the effect of this is to vest him with all the rights and privileges of the first holder and the court does not find to the contrary.

He had the right at any time after his agreement with the company's attorney, in 1878, to have obtained said coupons from Lawrence, their custodian, in behalf of the company, and the naked fact that Tinsman obtained them and delivered them to him in no respect qualifies the rights of Roseberry.

What legal obstacle then has intervened which bars a right of recovery in this action? By the requirements of the code of Missouri, the answer in a case like the present must disclose an affirmative defense.

Without again discussing the defects of this pleading, suffice it to say that upon the issues tendered by the answer the findings of the court as they appear in the record lead irresistibly to a judgment for plaintiff, even though the coupons be regarded as past due.

The court seemed to consider the case to be that the construction company, having failed to complete the road, voluntarily surrendered to the county, through its agent, cer-

tain matured coupons, and that said agent fraudulently and without authority or consideration to the county, re-issued the same. Hence the present plaintiff, although a purchaser for value, is not entitled to recover.

It is obvious that the answer discloses no such defense, nor do the findings of the court support the same.

The ultimate facts required to be found by the court in order to sustain such defense do not appear. The court merely finds, that in 1878, the former president of the bank at Pana (Lawrence, who was the representative of the Construction Company) "delivered the same to said Tinsman, said financial agent," who subsequently, in 1881, "without consideration, delivered them to his brother-in-law, Roseberry, one of the sureties on Tinsman's official bond," and that plaintiff, through his agent, brought the same of Roseberry for $2,500.

Had this action been instituted by Roseberry, the legal presumptions would all have been in his favor, as holder of the coupons it would have been presumed that he was the lawful owner thereof for value and before maturity. We submit that the findings of the court fail to meet these issues or overcome these presumptions.

It does not find that said coupons were surrendered for cancellation, or that Lawrence had any authority to surrender them to the county. It does not find why, under what circumstances, or for what purpose they were delivered to Tinsman. It does not find that they were delivered to Tinsman for the benefit of the county, or to him as the financial agent of the county acting in that capacity. True, the words, "said financial agent," are used in the finding, but used merely for the purpose of identification, and do not describe him as the financial agent of *Clark County* in this transaction. It is not found by the court that Tinsman, in thus obtaining those coupons, was acting by or under the instructions or authority of Clark county in the premises, or that he was even assuming to act in behalf of the county. It finds no fact which would deprive the coupons thus delivered

by Lawrence to Tinsman of their inherent vitality as commercial paper.

The finding is similarly indefinite as to the delivery of said coupons to Roseberry in 1881. They had been in Tinsman's possession since 1878, for what purpose or by what right or claim the finding fails to show. It does not claim that such possession was the possession of the county, or that during this interval he was the agent of the county. Nor is there aught in the finding which shows that this delivery to Roseberry was illegal or unauthorized. True the court says that there was no consideration between Tinsman and Roseberry for such delivery. This we can admit with propriety. The consideration, as we have before stated, was a former indebtedness of the company to Roseberry, and these coupons were delivered by the company to Rosberry through Tinsman in pursuance of a former agreement. The only definite and ultimate facts are that the representative of the Construction Company being in rightful possession of the coupons, delivered them in 1878 to Tinsman; that Tinsman retained them until 1881, when he without consideration delivered them to Roseberry.

The finding does not claim that the plaintiff herein was in anywise connected with the relations existing between Tinsman and Roseberry, or that he was aware of aught that occurred between them in reference to these coupons, which furnishes an additional argument against the propriety of the court considering such testimony and attempting to make the same an essential part of the finding in this action.

We have claimed that the facts as found would not have deprived Roseberry of his right to recover: certainly we can safely claim that the plaintiff herein, occupied, in the view of the court, a higher and better position. The court expressly finds that he was a purchaser for value, and by failing to find to the contrary, says he is a *bona fide* purchaser. There is no fact asserted which divests him of this presumption existing in his favor.

As before stated, the indefinite statements of the court that

plaintiff was aware at the time of his purchase of the "condition" of the coupons and the "controversy" between the county and the bondholders as to the "*alleged* fraudulent issue" of the bonds and coupons, does not charge plaintiff with notice of *facts* which would defeat his right to recover.

Concede that he did know the coupons were over due and detached, and consequently "distinct obligations," and was acquainted with the "general circumstances" of said controversy as to the bonds. How could this, without more, affect his position as a purchaser?

The court does not find that such controversy went to the merits of the bonds, or that the equities thereof were favorable to the county, nor that the county had in *fact* any substantial or valid defense thereto, or find facts which amount to it.

Neither does it find that the bonds would, under any circumstances, have been adjudged void, nor recite any *facts* which show that they were invalid.

In a suit of this character no allegation by defendant that plaintiff had *notice* would receive consideration unless accompanied by the declaration that such notice extended to certain facts or equities which rendered the obligation void. Such an answer would present separate issues as to the validity of the instrument and the notice of purchaser, and it would be necessary to determine both in favor of defendant in order to defeat plaintiff's cause of action.

The answer herein tenders no issue as to the validity of the bonds or coupons. The court in its finding does not pretend to determine their *status* in this respect; then of what avail is it if plaintiff did have the notice described by the court, unless it was further found that the same pertained to actually existing defenses or equities in behalf of the county which would enable it to successfully defend any action thereon.

We conclude from these recitals in the finding as to notice that the court *in their absence* concedes plaintiff's right to re-

8 How. (U. S.), 470, Prentice v. Zane:

"When the special verdict found that the original consideration of note was fraudulent, but omitted to state whether the holder had given a valuable consideration for it, or received it in the regular course of business, and the court below gave judgment for defendant, this court could not decide whether this judgment was erroneous or not, and would have been compelled to remand the case."

"A verdict finding matter uncertainly and ambiguously is insufficient, and no judgment will be given thereon."

"A verdict which finds but part of the issues and says nothing as to the rest is insufficient."

"In all special verdicts, the judges will not adjudge upon any matter of fact but that which the jury declare to be their own finding."

Tyng v. Grinnell, 92 U. S., 467:

"A special finding by the court upon issues of fact, a jury being waived, has the same effect as a verdict."

"Such a submission necessarily implies that the facts shall be found by the court."

"The special finding must not be a mere report of the evidence, leaving conclusions of fact to be drawn by the appellate tribunal, but the Circuit Court must state the ultimate facts which the evidence establishes."

"Such findings are intended by Congress as a proper substitute for the special verdict of a jury and the very essence of a special verdict is, that the jury shall find the facts"

20 How. (U. S.), 432, Suydam v. Williams.

A special verdict is when the jury find the facts of the case as presented by the figures found, and the trial court in giving judgment is confined to the facts so found.

Every special verdict must state the conclusions of the jury upon all the issues submitted.

Id., p. 441. "There must be a proper and valid issue between the parties, and a *perfect finding by the jury on the issue joined*. When the special verdict is ambiguous or imperfect, or finds but a part of the facts in issue and is silent as to the others, this court will regard the finding as a mistrial."

104 U. S., Collins v. Riley, 322:

A special verdict must state "the naked facts" and not a conclusion of law; and, therefore, when a special verdict announces that party is barred of recovery by the statute of limitations, it is fatally defective in not finding the required *facts which gave operation and effect* to the statute of limitations. "A special verdict must contain all the facts from which the law is to arise; whatever is not found therein is, for the purposes of a decision, to be considered as not existing. It must present in substance the whole matter, and can not, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record."

103 U. S., 556, Supervisors v. Kennicott:

"The evident object of the legislation of 1865 was to give special findings the same effect for the purposes of a writ of error as a special verdict."

109 U. S., 185, Retzer v. Wood:

This was an action to recover taxes illegally collected. The plea was the general issue. A jury being waived, the court made a special finding to the effect that the taxes had been illegally collected, but that the action was barred by statute of limitations. This court held—"as to the defense of the statute of limitations, it was not pleaded. It was not within the issue raised by the plea of the general issue, which *was the only issue* to which the stipulation for a trial by the court extended."

Plaintiff was entitled to judgment on the facts found, and the Circuit Court should be directed to enter such judgment.

The court refused to remand the case so as to allow the statute of limitation to be pleaded.

In the light of the foregoing cases, we submit that the judgment herein can not be sustained.

First.—It is based upon a defense foreign to the issue upon which the cause was by stipulation submitted.

The sole defense of the answer is, that Clark county was and is the owner of the coupons, and that plaintiff is not a holder of these for value. The court determines the facts here involved in favor of plaintiff, but renders judgment for defendant upon another and different theory.

Second.—The finding is indefinite and ambiguous.

It recites that in accordance with the contract of subscription the county received its certificate of stock and the bonds and coupons were delivered to the agent to be by him paid over to the railroad company upon order of the company as fast as the work progressed in said county. It does not find or show that said agent in any particular failed to discharge his duty in this respect, and does not find that the proceeds of the bonds were not honestly and faithfully applied to the construction of the road.

It finds that the Construction Company, under a contract with the Railroad Company to build the road, obtained and received said bonds in part payment, and that the Construction Company "used the bonds, but never did all the work required." The authority and good faith of this transaction are not disputed.

It traces these coupons in later years from the Construction Company to plaintiff, herein as a holder for value. It does not find that the county is or ever has been, since the original delivery, the owner of or entitled to said coupons, nor does it deny plaintiff's ownership or show any fact that bars his recovery.

Should this court apply the rule announced in Smith v. Sac county, *supra*, that a failure of the court to find any fact necessary to be proven in order to entitle the party to judgment is equivalent to a declaration that no such fact

exists, then the fabric of this judgment must crumble as lacking essential support.

Upon no hypothesis other than *actual fraud* could judgment have been awarded defendant, and yet the finding of facts not only fails to declare fraud, but is perfectly consistent with the good faith of all parties. The evidence offered by plaintiff showing Roseberry's legitimate claim to the coupons as a creditor of the Construction Company, and the consequent reasons why they were delivered to him by Tinsman, appears to have escaped the consideration of the trial court, there being simply a finding of the naked facts of such delivery.

There may thus be left opportunity for surmise and conjecture as to the motives and position of Tinsman, but this court can not, under the precedents of former decisions, attempt to draw inferences or in any way repair the defective finding in order to support the judgment.

V.

This case should be reversed, because the court permitted the defendant to read the depositions of the witnesses, Cherry and Tinsman, when the witnesses were present in court.

Through the inability of the plaintiff to be present at the taking of these depositions, they were taken without cross-examination, and plaintiff brought the witnesses to the trial in order to compel the opposite party to place them upon the stand, and the court still permitted the use of the depositions against his objection and exception. Plaintiff afterwards called Tinsman, but we submit that this does not cure the mistake made. As to the witness, Cherry, the deposition was used, and the question stands upon the ruling of the court.

The evidence of both witnesses was material to the case as the court decided it. The witness Cherry gave the evidence by which the court found the knowledge on the part of plaintiff, and Tinsman was the most important witness in the case. It is from his evidence that the court found the transfer to Roseberry was without consideration and all the facts as to the non-delivery of the coupons.

These depositions were taken under the statute, section 863, *de bene esse*. The authority to take and the right to use depositions has always been strictly construed by the courts, both State and Federal.

The statute is in derogation of the right of the adverse party to have a witness against him confronted by the court or jury so that they may observe his manner of giving testimony, his feeling or bias for either party, and his intelligence, which are important tests of the weight to be given his testimony.

Depositions *de bene esse* are, as the name imports, provisional, and the party offering such deposition must show as a preliminary condition that the witness is not present by

reason of some *statutory* exception. When the witness resides more than one hundred miles from place of trial the court presumes from the certificate of the magistrate that such is the fact, and that the witness continues to be beyond the jurisdiction of the court. But this presumption ceases whenever the contrary is shown, and the deposition becomes inadmissible.

The precise question was decided by this court in case of the Patapsco Insurance Company v. Southgate, 5 Peters, p. 604, which says: "The deposition of a witness living more than one hundred miles from the place of trial may not be always absolute, for the party against whom it is to be used may prove that the witness has removed within the reach of a subpœna after the deposition was taken, and if such fact was known to the party he would be bound to procure his personal attendance."

It is immaterial whether the witness has permanently moved within one hundred miles, or is temporarily within the jurisdiction, provided his presence in court is available. Certainly when the witness is in open court *in propria persona*, ready and able to testify, there can be no reason for allowing his deposition to be read, and it is a fatal error to read it.

The case has been followed as the rule since that time.

Pettibone v. Derringer, 4 Wart., C. C., 215; Weed v. Kellog, 6 McLean, 54; Russell v. Ashley, Hemp., 546; Merrill v. Dawson, *id.* 563; U. S. v. Tilden, Int. Rev., Rec. 25, 352; Desty's Fed. Procedure, Sec. 863 and 65, and cases cited.

It is a matter of right to an adverse party, that he shall be confronted with the witnesses as against him, and we cannot believe this court will sustain a practice so fatal to a fair administration of the law. If there was any defense in this case it was in the nature of fraud, and it was peculiarly a question where the witness who was to confess it should be seen and heard.

Under the law of Missouri, where the case was tried, the deposition could not have been read until proof was made that he was not within the jurisdiction of the court.

R. S. Mo., Sec. 2157.

which in effect provides that depositions may be taken upon notice when the witness resides outside the bounds of the state or in a different county, or at a distance of more than forty miles from the place of trial.

In Missouri the declared law is "that when a deposition is taken on notice, it cannot be read if the witness is present."

Chapman v. Kerr, 80 Mo., 163; Priest v. Way, 87 Mo., 16

The general rule in courts of law on this subject is that a deposition can not be used when the witness is in court.

1 Green. Ev., 323.
Starkie Ev., 410.
Mavan v. Roup, 8 Iowa, 210.

If it appears that the witness was a non-resident at taking of deposition, the same will not be excluded, unless it is shown the witness is present in court at trial.

Brewer v. Beckworth, 35 Miss., 367.

"The statute authorizes taking deposition of non-resident witness, but it will not be construed beyond the reason and necessity which gave rise to it, and hence such a deposition will not be competent evidence when it is shown the witness had, after it was taken, removed within the jurisdiction of the court and that his attendance might have been procured at the trial."

Boetge v. Landa, 22 Tex., 108.
Elliott v. Mitchell, 28 Tex., 112.
Brown v. Burnham, 28 Me., 38.
Great Falls Bank v. Farmington 41 N. H., 39.

We submit, therefore, in regard to this case that if coupons sued upon are unmatured paper, as we believe this court has held and will maintain there has been made, and can be made no substantial defense, and the controversy should be ended by the decision of this court.

We further submit that if they be regarded as past due and dishonored instruments, there has been no substantial defense shown, and the court in its finding of facts exhibits none, but does find sufficient facts to warrant a judgment in favor of plaintiff.

We submit further that if there be a defense to this action, the finding of facts does not fairly show it; the issues made did not exhibit it, and the plaintiff, by reason thereof and the errors of the court saved by the bill of exceptions, has not been fairly heard upon it, and the cause should be remanded for a new trial.

All of which is respectfully submitted.

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119-522

IN THE

Supreme Court OF THE United States.

OCTOBER TERM, 1886.

L. C. WHITFORD,
Plaintiff in Error,
vs.
THE COUNTY OF CLARK, MO.
Defendant in Error.
No. 82.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

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Attorneys for Defendant in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND ABSTRACT.

In the year 1871, under and by virtue of authority of an act of the legislature of the State of Missouri, entitled "An act to incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865. The County of Clark, in said State, executed its bonds to the amount of $200,000, bearing date June 1, 1871, due and payable twenty years thereafter, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first days of December and June of each year, during said twenty years, on the presentation and surrender

of the coupons thereto annexed, as they severally became due and payable.

The bonds were of denomination of $500 and $1,000, and issued upon the following order:

"CLARK COUNTY COURT,
MAY TERM, May 3, 1871.

Now, at this day, comes the Missouri & Mississippi Railroad Company, by its attorney, James M. Aspoe, and moves the court as follows, to-wit:

That said court, by and in behalf of the County of Clark, to subscribe for 2,000 shares of the capital stock of said Missouri & Mississippi Railroad Company, upon the terms and conditions set forth as per same filed this day, to-wit:

It is hereby ordered by the County Court of Clark County, in the State of Missouri, that said court, for and in behalf of said county, do hereby subscribe for 2,000 shares of the capital stock of the Missouri & Mississippi Railroad Company, upon the following terms and conditions, to-wit:

First. That the subscription, as aforesaid, shall be paid in the bonds of Clark County, Missouri, at par: that said bonds shall be of the denomination of $500 and $1,000 each, with coupons attached, said bonds running for the period of twenty years, and bearing interest at the rate of eight per cent. per annum, payable semi-annually at the National Bank of Commerce in the City of New York.

Second. That said bonds, or the proceeds of the sale thereof, shall be used by the said railroad company in the construction of that portion of the said railroad being within Clark County, and for the neces-

sary expenses of said company, and for no other purpose whatsoever.

Third. So soon as the said company file with the county clerk of Clark County their acceptance, in writing, of this subscription, in accordance with the terms thereof, this court shall forthwith issue said bonds properly executed, and immediately thereafter deliver the same to a financial agent, to be chosen by said court; the said agent shall execute a good and sufficient bond, to be approved by said court and railroad company, said bond to be made payable to the State of Missouri for the use of Clark County, Missouri, and the Missouri & Mississippi Railroad Compay and either of them, and conditioned upon the faithful performance as such agent. The financial agent shall have power to sell said bonds through the St. Louis Bond and Stock Board, or through Bartholow, Lewis & Co., bankers, of St. Louis, Missouri, and shall pay over to said railroad company the said bonds, or the proceeds of the sale thereof, on the order of said company, as fast as the work progresses on said company's railroad in said Clark County, each payment to include all work and necessary expenses expended in said county by said company on their railroad to the date of said payment.

Fourth. The said railroad company shall locate and maintain their said railroad within one-third of a mile from the town of Fairmont, and extending in a northeasterly direction to the town of St. Francisville, and shall locate depots both at Fairmont and St. Francisville.

Fifth. The said railroad company shall, within sixty days from and after the issuing of the bonds hereinbefore mentioned, and delivering the same as aforesaid, shall commence work on their said railroad

at Fairmont and St. Francisville, and shall continue the work continuously between said points, and push the entire work in said Clark County to completion without unnecessary delay.

Sixth. In case of the death or resignation of the financial agent, his successor shall be appointed by the county court, by and with the consent of said company.

Seventh. The acceptance of said Missouri & Mississippi Railroad Company of this subscription shall be held and construed as a release by said company of all rights, privileges and franchises, of which said company are, or may be, entitled to under and by virtue of an order made by this court at the August term, A. D. 1868, subscribing 750 shares to the capital stock of said company; and said company by accepting this subscription agree that said last-mentioned order may be rescinded and held for naught, and the same is hereby rescinded.

Eighth. Said railroad company shall deliver a certificate of paid up stock for the full amount of their subscription, when the bonds hereinbefore mentioned shall have been placed in the hands of the financial agent.

Ninth. It is further ordered that Roter S. Washburn, be, and is hereby, appointed to vote the stock of Clark County in all elections held by the said Missouri & Mississippi Railroad Company, and that A. S. Tinsman be, and is hereby, appointed financial agent in accordance with the terms of this order, whose bond is hereby fixed at the sum of $200,000.

Tenth. A certified copy of this order shall be delivered forthwith to the Missouri & Mississippi

Railroad Company by county clerk of Clark County." (Record, pp. 16, 17 and 18).

Then follows the acceptance by the Missouri & Mississippi Railroad Company. (Record, p. 18.)

After entering said order and its acceptance by the Missouri & Mississippi Railroad Company, the county executed the bonds and turned them over to its financial agent, A. S. Tinsman, taking from him the following receipt therefor, to-wit:

"Received of the County Court of Clark County, Missouri, 300 bonds of the denomination of $500 each, and numbered from one to 300, inclusive; also fifty bonds of the denomination of $1,000 each, and numbered from one to fifty, inclusive; all of said bonds issued by said Clark County in payment of stock subscribed by the County of Clark to the capital stock of the Missouri & Mississippi Railroad Company by order of the County Court of Clark County, made at its May term A. D. 1871. The said bonds are hereby received upon the conditions and terms of said order, and as financial agent appointed by said court by said order.

A. S. Tinsman,
Financial Agent for Cark County, Mo.

Missouri & Mississippi R. R. Co.
Filed June 23, 1871.

Matt. Woodruff,
(Record, p. 21). Clerk."

A. S. Tinsman, financial agent, as aforesaid, upon receiving said bonds took them to St. Louis and deposited them with Bartholow, Lewis & Co., bankers, through whom he had power to sell the same, according to the terms of said order. The bonds remained in the bank of said Bartholow, Lewis & Co.

until March, 1873, when they were withdrawn by said Tinsman, and at the time of their withdrawal the coupons in suit were detached; after withdrawing all of the bonds and detached coupons said Tinsman deposited them in the Exchange Bank of Pana, Illinois, taking the following receipt therefor:

"DR. EXCHANGE BANK in account with
A. S TINSMAN, Agt., Cr.

1873.					
March 11.	To Clark Co. bonds for.....				$190,000
" 6,	" "	150 coupons		40.	6,000
" 6,	" "	750 "		20.	15,000
" 6,	" "	100 "		20.	2,000
April 26,	" "	50 "		20.	1,000

(Record, p. 69.)

These bonds were placed in said bank so that they could be obtained by the Western Construction Company "*when earned.*" (Record pp. 63 and 64.)

At the time Tinsman withdrew said bonds from Bartholow, Lewis & Co., the following agreement was entered into, to-wit:

"This agreement, made and entered into by and between the Construction Company and the undersigned with A. S. Tinsman, as follows, to-wit: That in case said Tinsman withdraws the Clark County bonds from Bartholow, Lewis & Co. and deposits the same with G. P. Lawrence, then, and in that case, the said company and the undersigned hereby agree to save said Tinsman and his sureties harmless by reason of said change of deposit. It is further agreed hereby that said bonds of Clark County shall be expended in accordance with the terms of the order subscribing the same, and in no other way, and that the same, or the proceeds of the sale thereof, shall be drawn from

said trustee and said depositor, in accordance with said order.

For the faithful performance of the foregoing we hereby bind ourselves in the sum of $200,000 to said Tinsman and his sureties.

The construction company have signed the foregoing instrument by the president and secretary, and the individuals by their own hand and seal.

Western Construction Company, by A. C. Vandewater, F. A. Jones, and then it is signed by the signatures we have proved—Lawrance, Morse, Fogit and Noyes." (Record, p. 71.)

The Western Construction Company was formed for the purpose of constructing this road, and obtained through one Fogit, the contract to construct said road, to receive therefor "the work already done, the right of way obtained, all the subscriptions that were made, and that were to be made, and the bonds of the road," etc.

Thus, it will be seen that, up to March, 1873, no delivery of any of the bonds or coupons had been made by Tinsman.

These bonds and all coupons remained in the bank at Pana, Illinois, until 1874, and the delivery of the bonds with attached coupons took place upon the following orders of the railroad company:

"March 20, 1874

At the request of the Western Construction Company, who presented a certified estimate of work done in Clark County during the months of March, April and May, 1873, amounting, with incidental expenses, to the sum of $65,801.50; and an order for $66,000 of

Clark County, bonds signed by the secretary and president, on A. S. Tinsman, trustee, was given to said Western Construction Company.

ALBERT BLAIR,
Secretary."

(Record, p. 66.)

The other delivery appears by the following from the records of the Missouri & Mississippi R. R. Co.:

"MACON, MO., April 7, 1874.

The chief engineer, Charles Dubois, to-day furnishes an estimate of work done in Clark County during the months of June, July, August, September, October and November, A. D. 1873, with a statement of discount on Clark County bonds, both for the present and former estimate. The estimate has been approved by the president and an order issued by him to A. S. Tinsman to pay to the Keokuk & Kansas City Railroad Company, (the name having been changed from the Missouri & Mississippi Railroad Company to said Keokuk & Kansas City Railroad Company) the sum of $136,000, in Clark County bonds.

The items of the estimate are as follows:

Expenses of engineering - - - - - -	$ 1,800.00
Supt. general office, etc., - - - - - -	2,800.00
180,340 cubic yards of earth, etc. - -	54,102.00
21,450 " " " hard material -	8,580.00
20,478 " " " earth hauled -	1,622.24
Discount on bonds, - - - -	34,452.12
do do first estimate - -	32,902.75
	$136,249.11

ALBERT BLAIR, Sec'y."

(Record, p. 66.)

All of the bonds and coupons were delivered to the construction company, *except* the coupons now in suit, and they were retained in the bank, or by Lawrence, the president of the bank, until 1878, when he returned them to Tinsman, financial agent of Clark County, from whom he had received them. At the time of the delivery of the bonds in 1874 these coupons were *past due* and not *earned*.

Everything else was turned over to the construction company except these coupons; they were deposited by Tinsman, as financial agent of Clark County, and in 1878 were returned to him as such by G. P. Lawrence.

Tinsman's deposition:

Q. Did you ever have the coupons, described in said summons, in your possession as financial agent, as aforesaid?

A. Yes, sir.

Q. When did they first come into your possession?

A. In the year 1871, attached to the bonds issued, as aforesaid.

Q. What did you do with them?

A. Deposited them with Bartholow, Lewis & Co., St. Louis.

Q. When did you next see the coupons involved in this suit?

A. In March, 1872 or 1873, I think—I am not positive as to date.

Q. Where were they, then?

A. They were in St. Louis, in the hands of the same parties—Bartholow, Lewis & Co., aforesaid.

Q. Did you, or not, withdraw from Bartholow, Lewis & Co., said coupons at that time?

A. I did.

Q. In what condition were they in at that time—with reference to being attached or detached from the bonds?

A. They were detached.

Q. Were the said coupons deposited by you with Bartholow, Lewis & Co., as financial agent, or not?

A. They were deposited with the bonds by me as financial agent.

Q. After you withdrew them from Bartholow, Lewis & Co., what did you next do with them?

A. Deposited them in the Exchange Bank of Pana, Ill.

Q. How long did they remain there?

A. I don't know how long they remained in the bank—probably a year.

Q. Into whose possession did they then go, and by what authority and under what circumstances?

A. The Exchange Bank, in which the coupons involved in this suit were deposited, failed, and went into bankruptcy; they then passed into the hands of G. P. Lawrence, president of the bank.

Q. How long did they remain in the hands of G. P. Lawrance?

A. From the failure of the bank up to May, 1878, or about that time.

Q. State, if you know, what G. P. Lawrence did with said coupons?

A. He delivered them to me.

Q. State, if you know, in what capacity he delivered them to you—whether as financial agent or otherwise?

A. He (I) deposited them as financial agent of the county, and he simply returned them to me as such.

Q. State whether or not those coupons are now

in your possession, and if not, when did they leave your possession and under what circumstances?

A. They are not now in my possession; they left my possession in June, 1881. At that time I simply delivered them to Mr. Rese H. Roseberry, he being one of the securities on my bond as financial agent of Clark County.

Q. At the time you delivered the coupons involved in this suit, were they the property of Clark County?

A. They were.

Q. Were they ever at any time paid out by you to any person upon the estimate of the engineer of the Missouri & Mississippi Railroad Company?

A. No, sir.

Q. Did you ever at any time receive from Rese H. Roseberry, or any other person, any consideration for the coupons involved in this suit?

A. No, sir.

Q. Have you ever in any way or at any time sold the title to the coupons involved in this suit as financial agent of Clark County?

A. No, sir.

(Record, pp. 13, 14 and 15.)

The depositions of Bartlett, Jordan, McCoy and Stafford establish the fact that not over $25,000 worth of work was done in Clark County. (Record, pp. 8, 15, 33.)

For doing this $25,000 worth of work in said county the Western Construction Company, in 1874, got $200,000 in Clark County bonds, after it had assumed the contract of the railroad with the county, and had given A. S. Tinsman its obligation (Record, p. 71), that the bonds should be expended in accord-

ance with the terms of the order of the county court making the subscription, and that the same should "be drawn from said trustee and depositor in accordance with said order."

So that the construction company was a *particeps criminis*—in fact the real and original criminal—in the fraudulent issuing and negotiating the original bonds in 1874.

At the time the bonds and coupons were withdrawn from Bartholow, Lewis & Co. it seems, by the deposition of G. P. Lawrence, that the construction company gave its notes to said Bartholow, Lewis & Co for $28,000 to $30,000, for advances made by said firm to the railroad company; said notes were given in order that the construction company could have "the bonds out from under their lien, so that we could use them when we earned them." (Record, pp. 49, 50.)

This man G. P. Lawrence was the owner of the Exchange Bank of Pana, Illinois, and he was also the treasurer of the construction company, but he received them as a deposit in the Exchange Bank by Tinsman, agent. (Record, p. 69.)

This same man fraudulently delivered the unmatured bonds and coupons to the construction company and they passed into the hands of innocent and *bona fide* holders for value, and the county was compelled to make them good, and they were compromised through *Mr. Coquard*. These coupons being *past due* were never delivered, simply because they were supposed to be worthless, and they were returned to Tinsman, agent, never having been negotiated

We next hear of these coupons in 1881, when Coquard & Cherry, representing the plaintiff, are

hunting all over Northeast Missouri and into the State of Kansas for them.

N. T. Cherry, an attorney of Clark County, is enlisted as an attorney or agent of Coquard, as he supposed, but it afterwards turns out really for Whitford, the plaintiff, and he is sent to La Cynge, Kansas, to buy these past due and dishonored coupons which, after two days' negotiation, he bought for $2,500 and drew up a contract in the name of Whitford. Mr. Cherry was fully cognizant of the history of the bonds and coupons from their issue. (Deposition of N. T. Cherry, Record, pp. 23, 24, 25, 26, 27 and 28.)

These coupons, after they were returned to Tinsman in 1878, remained in his possession until 1881, when they passed into the hands of his brother-in-law, Rese. A. Roseberry, through Mrs. Tinsman, but nothing was paid for them, and Roseberry had no right, either legal or equitable, to retain or dispose of them, and acquired no title to them, either legal or equitable. Roseberry claimed the right to the coupons because the Western Construction Company was indebted to him on two notes, but he fails to show that he has any such notes or to produce any evidence of indebtedness of the construction company to himself. (Record, p. 41.)

Tinsman says they were given to Roseberry, because he was uneasy in regard to his being a security on his (Tinsman) bond, and "to satisfy him that they were supposed to be worthless." (Record, p. 66.)

He also says that he did not deliver these coupons to Roseberry under authority as surety for the claim said Roseberry had against the Western Construction Company. (Record, p. 68.)

This claim of Roseberry was evidently trumped up to try and raise a consideration for the delivery of

the coupons to himself by Tinsman, the financial agent of Clark County.

In order that the court may be fully advised of the connection Mr. Coquard, the agent of the plaintiff in error, had with the bonds and coupons of this $200,000 issue of Clark County, and as to his knowledge of the status of these particular coupons, we call attention to the deposition of N. T. Cherry, commencing on page 23 of Record; also the deposition of Benjamin F. Turner, commencing on page 33 of Record.

The case was submitted to the court without the intervention of a jury, and a general finding of the facts was had for defendant, and judgment entered, as follows:

"Now, again, come the parties, by their attorneys —the plaintiff by Messrs. Fishell & Rowell and the defendant by Messrs. Glover & Shepley—and this cause having been heretofore submitted to the court without the intervention of a jury, upon the pleadings, proofs, and argument of counsel, upon consideration whereof and being fully advised in the premises, the court finds the facts herein for the defendant, and orders that judgment be entered accordingly on said finding of facts. It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, the County of Clark, go hence without day and have and recover of the said plaintiff, L. C. Whitford, its costs in this behalf expended, and that a fee bill or execution issue therefor."

"Judge Treat rendered the following opinion and judgment yesterday in the U. S. Circuit Court.

L. C. WHITFORD,
v.
CLARK COUNTY.

"The court, sitting without the intervention of a jury in the trial of this cause, finds the facts to be:

That the said county subscribed, in the year 1871, for 2,000 shares of the capital stock of the Missouri & Mississippi Railroad Company, to be paid in the bonds of said county at par, running for the term of twenty years, and bearing interest at the rate of eight per cent. per annum; said bonds, or the proceeds thereof, to be used in the construction by said company of that part of the railroad lying within said county.

The county was, under said contract of subscription, to deliver its bonds forthwith to a financial agent, to be chosen by its county court, who was to give his bond as agent, subject to the approval of the company and of the court, for the use of the county and of the company, conditioned for the faithful performance of his duties as such agent, he to have power to sell the bonds through the St. Louis Bond and Stock Board, or through Bartholow, Lewis & Co, bankers, of St. Louis, and to pay over to the railroad company the said bonds, or the proceeds of the sale thereof, on the order of said railroad company, as fast as the work progressed on the railroad in said county, each payment to include all work and necessary expenses expended in said county to the date of said payment.

The bonds, with interest coupons annexed, were accordingly delivered to one Tinsman, who had been duly appointed such financial agent, and given his official bond, conditioned and approved as required. The county also appointed an agent to vote its stock, and

received a certificate therefor. Said financial agent deposited the bonds and coupons with Bartholow, Lewis & Co.

The railroad company entered into a contract with a construction company, in 187 , to build the road and to receive in part payment therefor the bonds of Clark County. At the instance of said construction company the county bonds and coupons then in possession of Bartholow, Lewis & Co. were removed to and deposited with the Exchange Bank at Pana, Ill., in 1873, said construction company, with sureties, indemnifying said Tinsman, the financial agent, for said removal, and making provision also for a lien said Bartholow, Lewis & Co. had on said bonds and coupons to the amount of about $30,000. There were deposited with said Exchange Bank, in 1873, to the credit of said Tinsman, agent, Clark County bonds to the amount of $19[illegible],000, and detached coupons to the amount of $24,000. The construction company obtained and used the bonds, but never did all the work required, nor did the railroad company; the construction company and the Exchange Bank failed. The coupons in suit continued in possession of the former president of said bank after its failure until the year 1878, when he delivered them to said Tinsman, the said financial agent. Said Tinsman retained possession of them until 1881, when he delivered them, without consideration, to his brother-in-law, Roseberry, who was one of the sureties on his (Tinsman's) official bond. At that time Clark County was negotiating with its bondholders for a compromise on its bonds and coupons issued for its subscription to said railroad stock, as heretofore stated. The coupons in suit had been for many years detached from the bonds and treated as a distinct and matured obligation. The plaintiff, through his agent, negotiated for and

bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, sister of Roseberry, received from Roseberry $1,150. The condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit.

Whereupon the court declares that the plaintiff is not entitled to recover, and orders judgment for the defendant.

BRIEF AND ARGUMENT.

This case comes to this court upon a writ of error sued out by the plaintiff below. The court is prohibited by sec. 1011, Rev. Stat. U. S., from reversing a case on writ of error for any error in fact.

In the case of Hyde v. Booraeman, 16 Pet. 176, the court say: "We have no authority, as an appellate court, upon a writ of error to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. * * * * We can only reexamine the law so far as he has pronounced it, upon a statement of facts, and not merely a statement of the evidence of facts, found in the record, in nature of a special verdict on an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before this court by an appropriate exception in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions in matters of fact; unless this is done, it will be found extremely difficult

for this court to maintain any appellate jurisdiction in mixed cases of the nature of the present."

"A writ of error can bring up to this court nothing but questions of law."

Parks v. Turner *et al.*, 12 How. 43.
Jeffries v. Mut. Life Ins. Co. of N. Y., 110 U. S. 305.

The proper practice, "in order to disembarrass the proceedings, as far as possible, in this peculiar mode of the trial of a common law case, and to enable the appellate court to re-examine the point or points of law involved, the counsel after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination."

Arthurs *et al.* v. Hart, 17 How. 15.

"Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision, except what it would have done had there been a jury trial."

Insurance Co. v. Folsom, 18 Wall. 250.
Norris v. Jackson, 9 Wall. 125.
Coddington v. Richardson, 10 Wall. 516.
Miller v. Insurance Co., 12 Wall. 285.

This court, in the case of Martinton v. Fairbanks, 112 U. S. 670, fully settles what the record must disclose, in order that the case may be properly reviewed on writ of error.

Plaintiff in error contends and complains that, from the record, he is unable to tell exactly what the court did find except generally, for the defendant.

This complaint comes at the wrong time and in the wrong place; the rules of practice were well settled when the case was tried below, and he could have availed himself of the privilege of asking the court for a special finding, and had such finding made a part of the record proper in this case; he could have presented any declarations of law he thought proper, and had the refusal thereof embodied in the record.

The record shows the following finding:

"And being now fully advised in the premises the court finds the facts herein for the defendant, and orders that judgment be entered accordingly upon said finding of facts," etc.

Attached to the record, under rule 8, is the opinion delivered by Judge Treat upon trial of the case.

I.

In the brief and argument (p. 16), heretofore filed by counsel for plaintiff in error, we find an objection to the reading of the deposition of witness Cherry. This objection is merely technical the plaintiff was not injured thereby; the witness was in court and could have been called; the trial was before the court without the intervention of a jury, and the admission of testimony under such a state of circumstances is not error, although the rejection thereof might have been.

U. S. v. King *et al.*, 9 How. 854.
Arthurs *et al.* v. Hart, 17 How. 6.

This witness Cherry was one of the attorneys employed by plaintiff, and as such interested in having his client succeed in this action. He purchased these coupons for plaintiff, and had been engaged through

Coquard, on behalf of bondholders in the general litigation with Clark County, growing out of the issue of the $200,000 in bonds.

II.

Plaintiff contends (p. 17 of Brief) that the court erred in admitting the testimony of the witness Bartlett, as "wholly and entirely irrelevant, immaterial and incompetent."

Suppose it were; which we deny, the trial being by the court, the same rule will apply as in the objection to the testimony of witness Cherry. The rule adopted by this court in the case of Arthurs *et al.* v. Hart, 17 How. 6, is as follows:

"Where the court decides questions, both of law and fact, the admission of improper testimony is not the subject of a bill of exceptions, although the exclusion of proper testimony is so."

III.

We now come to consider the objections urged by counsel to the opinion of the court, treating it as a special verdict. They say (p. 17 of Brief): "The finding of the court that the condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County, concerning the alleged fraudulent issue of the bonds and coupons in suit in no sense warranted the judgment of the court. * * * It was an immaterial finding, responding to no fact in the case upon which to base judgment." Counsel in attacking the opinion see proper to commence at the end of the opinion and work back.

If this finding was immaterial, the trial being by the court, plaintiff can not be prejudiced thereby, and it is unnecessary to notice this any further.

"The county did subscribe for stock in the road." (p. 18 of Brief.)

This is true, but the bonds were not to be delivered except *as earned*, and then only upon the order of the trustee, Tinsman, the earning being a condition precedent, according to the terms of the subscription, which said terms were accepted by the railroad company and ratified and accepted by the construction company in its guaranty given to Tinsman, when the bonds and coupons were transferred from Bartholow, Lewis & Co. to the Exchange Bank of Pana, Illinois, in 1873.

"The agent did disburse the bonds," etc. (p. 18 of Brief.)

This is true, but the coupons in suit were never disbursed or negotiated; they were *overdue* and *dishonored* when the fraudulent estimates were furnished in 1874; and although the *bonds were* turned over to the construction company, amounting to $190,000, not over $25,000 worth of work had been done under the terms of the order issuing them; the delivery of the bonds was fraudulent as against the county, and had they not been negotiated and sold to innocent parties for value before their maturity, no recovery could have been had on them; neither the railroad nor construction companies could have recovered upon them. Counsel say, "why speak of a fraudulent issue of bonds, or of an alleged fraudulent issue, or of the controversy between the bondholders and Clark County, * * * being known to the plaintiff when he bought the coupons in suit." The coupons derived

their existence from the bonds, and the plaintiff being a purchaser long after maturity and dishonor, outside of the knowledge the law imputes to him, had actual knowledge that there was a defect in the honesty of the original negotiation of the *bonds*, and that the consideration therefor had failed; he could not shut his eyes so as to assume the role of an *innocent purchaser* for value by going into the wilds of Kansas to hunt up these overdue coupons that had never been negotiated, and purchase them from a man who gave nothing for them, and to whom they had been delivered by Tinsman, the financial agent of Clark County, in whose possession they had been for three years, simply "to satisfy him they were worthless."

The plaintiff complains of the state of the pleadings and indirectly complains of the evidence received thereunder and the issues raised thereby. This isnot the place to raise such objections, none were made to the pleadings (which were proper), nor to the introduction of testimony thereunder in the court below.

"The defendant does not show forth in its answer any facts showing want or failure of consideration." (p. 19 of Brief.)

This statement we deny, the answer alleges "that no consideration was ever received by Clark County from plaintiff, or any other person on account of said coupons, or any of them." (Rec. p. 6.)

The coupons were long overdue, almost barred by the statute of limitations, when they came into the hands of plaintiff and he took them *cum onere*. Plaintiff contends they were delivered to the construction company. This we deny, and the evidence and finding of facts in the opinion of Judge Treat bears us out in

this statement. Suppose they were delivered to the construction company, how does this help the plaintiff? None of the bonds or coupons were delivered until 1874, and these coupons were then past due and dishonored and detached. Even if they had not been matured the construction company could in no event be treated as an *innocent purchase for value*. The obligation it gave to Tinsman, financial agent of Clark County, when the bonds and coupons were withdrawn from Bartholow, Lewis & Co. of St. Louis and deposited with the Exchange Bank of Pana, Ills., places it in the shoes of the Missouri & Mississippi Railroad Company so far as the bonds of Clark County are concerned. And if it did recieve them it was wrongful and known by it to be wrongful, for they were not *earned* as agreed by the construction company. They were returned to Tinsman, financial agent, because they were supposed to be worthless, and by him turned over to Roseberry, his brother-in-law, without any consideration and purchased by plaintiff for the *valuable* consideration of $2,500 long after maurity. They were matured and dishonored before there was any delivery of any of the bonds or conpons to any one by Tinsman, which took place upon the estimates furnished in 1874, (Rec. p. 66.)

Plaintiff also contends that defendant recieved 2,000 shares of the stock of the railroad corporation for the bonds and coupons. This certificate was to represent a certain interest in a *constructed* railroad, not a paper one, and the bonds were not to be paid out until *earned* by the actual construction of the road, and then only upon the estimates furnished by the engineer. All that Clark County ever got for $200,000 of its bonds was this certificate of stock.

Plaintiff says: "These bonds and coupons were

accepted by the construction company. They were then lawfully made, issued, and delivered and accepted. In this position and condition they were valid and binding obligations of the county, and subject to no defense in the hands of any one. How, then, can the mere act of Mr. Lawrence, without any authority from any one in surrendering the coupons to Mr. Tinsman, whether agent of the county or the railway company, or of both, or not, affect the prior delivery of the coupons, and re-vest the title to them in the county. We contend they were never delivered to the construction company. But suppose they were; how, then, can the mere act of Mr. Tinsman, the financial agent, without any authority from any one, but in the face of the contract and agreement with the county and railroad company, also the contract of the construction company with himself, divest the title of the county? The proposition announced by plaintiff above quoted goes a little farther than he really intended, and if it be correct, which we deny, it is as broad as it is long. He says these instruments, being payable to bearer, pass by mere delivery, which is true; but even if they had been delivered, and were, at one time, lawfully the property of the construction company, they came directly back to Tinsman, who wrongfully delivered them, and became as if they never had passed out of his hands. He was the *trustee*, and in this transaction could acquire no rights by delivering them to any one. He was bound to the utmost good faith towards his *cestui que* trust, Clark County, and even if they had passed through the hands of any number of innocent purchasers, when Tinsman acquired them again they were the property of Clark County, and subject to defenses in the hands of any one who might thereafter acquire them, even for value, for they were long *overdue* and dishonored.

"The bonds were all disposed of to the construction company, and the coupons, although detached, were mere incidents of the bonds and belonged to the construction company, were its property in the hands of Mr. Lawrence." (Brief p. 20). This is a strange statement when, in another portion of the brief, it is claimed the coupons were *attached* to the bonds. (Brief p. 21.) There is nothing in the bill of exceptions or the opinion of the court from which any delivery to the construction company of the coupons in suit can be inferred.

"They were delivered to him (Rosebury) with the consent of the company as security for the money due and owing by the company," etc. (Brief p. 20.)

This can not be true. Mr. Lawrence, the president of the Exchange Bank of Pana, Ill., in answer to the following question;

"50 Q. State why you gave the coupons referred to, to Tinsman? Stated:

51 A. I thought that any man who would come from Clark County ought to have them. He brought the book back, and I thought they were worthless and I gave them to him." (Rec. pp. 51 and 52.)

Tinsman said they were given to Rosebury to satisfy him they were worthless. The company failed in 1874, as soon as it received the bonds and coupons not past due and negotiated. No doubt its original intention was to fraudulently obtain possession thereof, dispose of them to innocent parties, pocket the proceeds, and then abandon the work, which it did.

IV.

"The coupons being attached to the bonds, were delivered by the county through its agent to the West-

ern Construction Company before maturity of any of them, so that company had valid title to the same, and could recover upon the same; and if so, so could any transferee of the construction company, mediate or immediate."

If the construction company ever received these coupons (which it did not), how can plaintiff contend it was an innocent holder for value before maturity? None of the bonds or coupons were delivered until March and April, 1874. (Record, p. 66.)

The construction company had assumed the contract of the Missouri & Mississippi Railroad Company with Clark County, and contracted with Tinsman, the financial agent of the county, that they were *not to be drawn out of the* Exchange Bank *until earned*, and then only on the *order* of the railroad company, which order was to be given on the estimate of the engineer. If it acquired them in any other way or without *earning* them by doing the work, such acquisition was fraudulent. They were by the terms of the order to be taken at par, and the county could not be charged with the discount at which the construction company sold them. *Innocent purchasers for value* was this construction company indeed! It could not have recovered one dollar on any of the bonds and coupons that *were* delivered. But whether it could or not they passed by delivery and were *returned*, because thought to be worthless to the agent of the county, and were never by him negotiated to any one; he simply turned them over to Roseberry *without consideration*, from whom plaintiff purchased.

Plaintiff's counsel seem to think we are attempting to vary or contradict the terms of a written contract. They are mistaken in this view. We are seek-

ing to have the court impose on plaintiff the burden the law attaches to any one acquiring negotiable paper after maturity and dishonor; that he stands in the shoes of his transferrer; these coupons came into the hands of plaintiff by fraud committed upon the maker by all the parties into and through whose hands they have passed, and the consideration therefor has failed; and that plaintiff had knowledge thereof in addition to that which the law imputed to him when he purchased them.

We seek to impeach these coupons as valid and binding obligations in the hands of the plaintiff, not to vary or contradict their terms. The transferee of overdue paper takes it as a holder with notice (there being no intervening, innocent purchasers for value); that it is subject to some defense, for he takes it at a time when in due course it should have been paid. "He is, therefore, subject to the defense: (1) That it was affected in its inception with some inherent vice, as, for instance, fraud, illegality or duress; or (2) that the consideration failed, * * * or that there was some equitable defense arising out of the transaction, in which the paper was given, which disabled his indorser in whole or in part to recover. Any of these defenses is called an equity attaching to the instrument."

1 Daniel (3d ed.), sec. 725*a*.

The defendant has kept strictly within the above rules.

"The fact that the bonds from which the coupons sued on have been detached have been paid and surrendered, does not affect the right of recovery upon them. They thereby lose their character as incidents

of the bond, but are still independent and self-sustaining instruments." (p. 21 of brief.)

If the plaintiff's counsel are serious in announcing the above proposition, we do not see how they can contend for a recovery. We had supposed the coupons drew their negotiability from the bond, and were mere interest warrants; the bond being the parent, the coupons possessed the same attributes. If they are *independent instruments* they must stand or fall as such by their terms. They, as independent instruments, are not the act and deed of any county; they do not bear the signature of the presiding justice of the county court, nor have they the seal of the county attached, nor are they negotiable by their terms. We fear this is but one of the many extreme positions forced upon counsel by the extremities of the case.

The plaintiff seems to rest upon the presumption the law raises because these negotiable coupons were payable to bearer, therefore imports *prima facie* that he acquired them *bona fide* for full value in the usual course of business before maturity, and without notice of any circumstances impeaching their validity. But what does such a presumption amount to when the proof is to the contrary?

"The transfer by delivery merely leaves no footprints upon the paper by which the time can be traced. And the presumption in favor of the holder as to the time of transfer being without any corroborative testimony is of the slightest nature, and open to be blown away by the slightest breath of suspicion."

1 Daniel, sec. 784.

Counsel attempt to raise an estoppel against the county because it had received a certificate for 2,000 shares of stock in the railroad, and cite several author-

ities to support it. An examination of those cases will reveal the fact that the parties seeking to recover therein were holders of bond and coupons *before maturity, for value*, and without notice. The defense relied upon want of authority in issuing the bonds—that is, the conditions precedent had not been complied with, such as taking vote, etc. The court, in substance, held that the coupons having passed into the hands of *bona fide* holders for value before maturity, the municipalities were estopped to deny the performance of conditions precedent. In the case at bar, there is no question about the authority of Clark County to issue the bonds and coupons. The bonds were executed and placed in the hands of Tinsman upon an order made a matter of record, and the acceptance of the railroad company was also entered of record; the construction company took the subscription off of the hands of the railroad, and undertook to do and perform that which the railroad company had agreed to do and perform. It failed to do or perform any part of the agreement for which it was to receive the bonds, but by a trick and fraud obtained the bonds and coupons in 1874 that were then unmatured. It gave nothing for them, and this is what the court found in the following language: "The condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark County concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff, when he bought the coupons in suit." The contract with the railroad company was contemporaneous with the bonds, and no estoppel could be created in favor of any one standing in the position of the railroad company or the construction company. But, as has often been suggested, these coupons in suit were never delivered to the construction company, and, as found by the court: "The

coupons in suit remained in the possession of the former president of said bank after its failure until 1878, when he delivered them to said Tinsman, the said financial agent."

It is impossible for this finding to be true, if they were ever delivered to the construction company, and we are bound by the finding. We have noticed the main points in the first brief filed on behalf of plaintiff in error, in order that no misunderstanding might arise upon a consideration of the case.

V.

We come now to the points presented by the writ of error.

The finding of facts, in the opinion of the judge, attached to the record, are clear, plain, simple, and cover the whole case. An examination thereof will reveal a history, as found by the court, of these coupons, from the time of their issue to the time they were purchased by the plaintiff. If this finding will support the judgment, this court, under well settled principles, will not interfere with it.

What does the court really find?

1. The issue of the bonds in 1871, and the terms and conditions under which they or the proceeds were to be delivered to the railroad company.

2. The bonds with interest coupons were delivered to Tinsman, the financial agent of Clark County, and by him deposited with Bartholow, Lewis & Co.

3. That the railroad company entered into a contract with a construction company, in 1872, to build the road and to receive in part payment therefor the bonds of Clark County.

4. At the instance of the construction company the bonds and coupons in the possession of Bartholow, Lewis & Co. were removed to and deposited with the Exchange Bank of Pana Ills., in 1873, the construction indemnifying Tinsman, the financial agent, for said removal.

5. That said construction company made provision for a lien Bartholow, Lewis & Co. had on said bonds and coupons to the amount of $30,000.

6. There were deposited in the Exchange Bank, in 1873, to the *credit of Tinsman*, agent, Clark County bonds to the amount of $190,000, and *detached* coupons to the amount of $24,000.

7. The construction company obtained and used the *bonds*, but never did the work required, nor did the railroad company.

8. The construction company and the Exchange Bank failed.

9. The *coupons in suit continued* in the possession of the former president of said bank after its failure until the year 1878, when he delivered them to said Tinsman, the said financial agent.

We suggest this finding is very plain. They remained in the bank until its failure, then into the possession of the former president of said bank until 1878, when he returned them to Tinsman, financial agent of Clark County. If this finding be correct, how can plaintiff contend they were delivered to the construction company? This *affirmative* finding of the course these coupons had taken excludes any other view. It was then unnecessary to make a negative finding. The court did find the *bonds* were obtained and used, and following that finding is the above affirma-

tive finding as to what was actually done with the coupons in suit.

10. Tinsman retained possession of them until 1881, when he delivered them, *without consideration*, to his brother-in-law, Roseberry, who was one of the sureties on his (Tinsman's) official bond.

11. At that time Clark County was negotiating with its bondholders for a compromise on its bonds and coupons issued for its subscription to said railroad stock, as heretofore stated.

12. The coupons in suit had been for many years detached from the bonds and treated as a distinct and matured obligation.

13. The plaintiff, through his agents, negotiated for and bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, sister of Roseberry, received from Roseberry $1,150.

14. The *condition of said coupons*, and the general facts and circumstances of the controversy between the bondholders and Clark County, concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit.

We contend that the court could not well find the facts any more specific. A complete history of these coupons is clearly set forth, and upon such finding the court ordered judgment entered for defendant.

When the case is submitted to the court without the intervention of a jury, special findings are no more subject to revision than general findings; they have the same effect as the verdict of a jury.

"Appellate courts have no more power to review the verdict of a jury where it is special than if it be

general; but they may inquire and determine whether the special verdict is the proper basis of a judgment. And the Act of Congress provides that the review, if finding is special, may extend to the determination of the sufficiency of the facts found to support the judgment."

Twing v. Grinnell, 92 U. S. 471.

VI.

The law applicable to the facts found by the court has been throughly settled by repeated decisions of this court.

The coupons in suit are negotiable instruments, but they were overdue and dishonored when plaintiff received them.

"The paper retains its commercial attributes and circulates as such in the community, but there is this vital distinction between the rights of a transferee who received the paper before, and one who received it after maturity: The transferee of negotiable paper, to whom it is transferred after maturity, acquires nothing but the actual right and title of the transferrer. * * * In other words, the transferee of negotiable paper * * * overdue, takes it subject to all equities with which it was incumbered in the hands of the party from whom he received it; * * * it was disgraced to him."

1 Daniel (3d. ed.) sec. 724*a*.
Texas v. Hardenburg, 10 Wall. 68.
Foley v. Smith, 6 Wall. 492.

Apply the above principle to the finding of the court that plaintiff, in 1881, acquired the coupons in suit from Roseberry, who, in 1881, received them

from Tinsman, *without consideration*, it becomes clear that neither plaintiff nor Roseberry could recover unless *Tinsman* could recover. Will plaintiff's counsel contend for a moment that Tinsman, the financial agent, could recover were he suing on the coupons? Suppose, for the sake of the argument, the coupons had been delivered to the construction company before their maturity? The court found that neither the railroad nor construction company ever did the work as agreed in Clark County. By such a delivery then a fraud was committed upon the county by Tinsman and the construction company. When the coupons came again into the hands of *Tinsman* he could not divest himself of the fiduciary relations he held toward Clark County, so as in any way to negotiate or dispose of them after their return to him in 1878, they being overdue. The party taking them was bound by law to take them with the burdens attached, especially Roseberry, whom the court found paid nothing for them, and had been holder thereof, without consideration, and from whom plaintiff purchased.

This court, in the case of Fowler v. Brantly *et al.*, 14 Pet. 318, laid down the following rule:

"A note overdue, or bill dishonored, is a circumstance of suspicion to put those dealing for it afterwards on their guard, and in whose hands it is open to the same defenses it was in the hands of the holder when it fell due."

It, therefore, becomes pertinent to inquire, where these coupons were when they fell due?

It will be observed that part of these coupons fell due in 1871, part in 1872, and part in 1873. The court found that all the bonds and coupons were deposited in 1871 by Tinsman with Bartholow, Lewis &

Co. In 1873 they were removed from Bartholow, Lewis & Co. and deposited with the Exchange Bank of Pana, Ill., to the credit of said Tinsman, agent. "The construction company and Exchange Bank failed. The coupons in suit continued in the possession of the former president of said bank after its failure until the year 1878, when he delivered them to said Tinsman, the said financial agent." Therefore, in 1871, 1872 and part of 1873, these coupons were in the possession of Bartholow, Lewis & Co., to the credit of Tinsman, and had not been negotiated. They were in 1873 withdrawn by Tinsman and deposited in the Exchange Bank to his credit as agent, where they remained until the bank failed, and they then remained in the hands of the former president of said bank until 1878. Such finding accounts for the possession of the coupons in suit, from the time of their issue to five years after their maturity, at which time they were returned to Tinsman. No negotiation of them had taken place, and they were still the property of Clark County, and in the hands of its agent, Tinsman, and long overdue. Now, applying the rule before quoted, they were in the hands of Tinsman, or in bank to Tinsman's credit, when they fell due and became dishonored. The court found "the construction company obtained and used the *bonds*, but never did all the work required, nor did the railroad company." Therefore, the failure to do the work according to contract became a subject of defense to these coupons in whosoever hands they may have gone.

These coupons were in the hands of Tinsman, agent, after maturity. Perfect good faith is required of him, and if he uses negotiable paper belonging to his principal for other purposes than those authorized by his principal, if the paper be overdue when used, the taker

and subsequent holders, although for value, can not recover.

1 Daniel (3d ed.), sec. 282.

"A person who takes a bill, which on the face of it was dishonored, can not be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it."

Andrews v. Pond *et al.*, 13 Pet. 65.

In other words, if he acquires the paper after maturity although for value, he is not a *bona fide* holder unless his transferrer was.

Placing Mr. Whitford, the plaintiff, in Roseberry's shoes, we have him receiving the coupons from the agent of Clark County, Tinsman, *eight years* after the maturity and dishonor of part of them, and nearly ten years after the maturity of others, without any consideration for their transfer. It strikes us very forcibly that his cause of action is entirely swept away by the application of the laws governing negotiable paper to the finding of the court.

He is not some poor innocent purchaser who has obtained this paper for a valuable consideration in the usual course of business. It took his agents some time to find them, but diligence being its own reward, they were traced into the wilds of Kansas, and $20,000, face value, purchased for the enormous sum of $2,500, *nearly ten years after their maturity*, and from a man who gave no consideration therefor.

The coupons never having been negotiated until long after maturity and coming directly into hands of plaintiff, he took them subject to the claim the county had been making; that the railroad company and the construction company disregarded their promise to construct the road; also that its agent delivered, and the construction company received, the original bonds in violation of *special* conditions imposed by the county in making the subscription and issuing and placing the bonds in the hands of Tinsman, who, by his receipt, received them subject to such special conditions. The court found that plaintiff, when he purchased the coupons in suit, knew of the controversy of the alleged fraudulent issue of the bonds, and they being long overdue and dishonored, he was bound by law to take them subject to any defenses that might have been made to them in the hands of Tinsman, the agent. Plaintiff was a purchaser after maturity, with actual notice of the facts and circumstances surrounding them, in addition to the notice the law imputes to the purchaser of overdue negotiable paper.

This court, in the case of Parsons v. Jackson, 99 U. S. 440, approved in the case of Railway Company v. Sprague, 103 U. S. 762, says, in speaking of the purchaser of bonds with past due coupons:

"The presence of past due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry."

Also:

"A person who takes a bill which, upon the face of it, was dishonored, can not be allowed to claim the privileges which belong to a *bona fide* holder without notice."

Ibid.

The case at bar is a much stronger one. The coupons sued on were detached, long overdue and dishonored, and the price at which they were purchased was inconsiderable, being twelve and one-half cents on the dollar.

They were not purchased in market overt, or in the usual course of business, as understood by such terms. The bonds were in process of compromise through Mr. Coquard, the agent of plaintiff, and it was known that these coupons had never been returned to the county, and no doubt they were hunted up by him through Coquard for the purpose of making a speculation upon, and getting the county to take them in upon the same terms as the bonds.

"Defense of maker can only be cut off by payee's indorsement before maturity."

Trust Company v. National Bank, 101 U. S. 68.

One of the grounds of contention on behalf of plaintiff is, that he is a purchaser for value, and, therefore, we can not attack the instrument in his hands by the character of testimony introduced. A complete answer to this position is to be found in the case of Angle v. N. W. Mutual Life Ins. Co., 92 U. S. 341.

The court say:

"When it is proposed to impeach the title of a holder, for value, by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim exception from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and cir-

cumstances at the time the transfer was made. These principles are of universal application; *but when a person takes a negotiable security which, upon the face of it, is dishonored, he can not, says Taney, C. J., be allowed to claim the privileges which belong to a bona fide holder.*"

Andrews v. Pond, 13 Pet. 65.

Again, quoting from this court, Smith v. Sac County, 11 Wall 146 and 147:

"Treating the bonds and coupons sued on in this case, which are payable to bearer as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a *bona fide* purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown, in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he did give value for it *before maturity.*"

Stewart v. Lansing, 104 U. S. 505.

This court has repeatedly held that coupons detached from bonds are negotiable instruments, and capable of separate ownership and transfer.

Clark v. Iowa City, 20 Wall. 583.

But they are no more favored than any other class of negotiable paper, and in all respects burdened with equities if the holder is one after maturity; or if he acquired them before maturity, then he must have actual knowledge of the claims made by the maker as to their validity.

The court found in this case that plaintiff purchased them in 1881, and that he knew of the alleged

fraudulent delivery of the bonds to the construction company.

What more could the court find? The main question is: Can the judgment be sustained upon the finding of facts? If so, this court will not interfere.

Respectfully submitted,

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